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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARY JONES, et al.,

Petitioners,

v.

AMALGAMATED WARBASSE HOUSES, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. In a civil rights class action, may a district court arbitrarily reduce the amount of attorneys' fees to be awarded that has been agreed upon by the parties, which the record establishes is clearly reasonable, which has been negotiated at arms' length, where there has been no collusion, and where there has been no injury to the interests of the class?

2. May a district court award fees in civil rights cases which are substantially below the levels awarded in other types of litigation (the issue sub judice in Blum v. Stenson, No. 81-1374)?

PARTIES

Mary Jones, Beverly Harris, Ernest Simmons, Mildred Malloy, petitioners. Amalgamated Warbasse Houses, Inc., New York State Division of Housing and Community Renewal, Richard Berman, respondents.

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October Term, 1983

MARY JONES, et al.,

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v.

AMALGAMATED WARBASSE HOUSES, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Mary Jones, et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 14, 1983, affirming the decision of the District Court for the Eastern District of New York relating to an award of attorneys' fees.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 721 F.2d 881, and is set forth in the Appendix at pages 1a-18a. The Memorandum opinion of the District Court is reported at 97 F.R.D. 355 and is set out in the Appendix at pages 19a-46a. The supplemental memorandum opinion and order of the District Court is reported at 97 F.R.D. 362 and is set out in the Appendix at pages 47a-61a. Also set out in the Appendix at p. 62a is the report of the Magistrate recommending approval of the settlement agreed upon by the parties.

JURISDICTION

The judgment of the Court of Appeals affirming the decision of the District Court was entered on November 14, 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

This case involves 42 U.S.C. § 1988 which provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title [42 U.S.C.] * * * the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the the costs. (R.S. 722 (1866) as amended, 90 Stat. 2641 (1976.)

This case also involves Rule 23(e), F.R. Civ. Proc., which provides:

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
>
> (As amended Feb. 28, 1966, eff. July 1, 1966.)

STATEMENT OF THE CASE

1. Proceedings Below

The present action was brought in 1980 by low-income black citizens against the

Amalgamated Warbasse Houses, Inc. and the New York State Division of Housing and Community Renewal. The complaint charged that the defendants had practiced racial discrimination with respect to the selection of tenants in State-supported housing. A settlement was reached on August 9, 1982, under the supervision of a United States Magistrate. The Magistrate recommended approval of the entire settlement, including the agreement as to attorneys' fees. (Appendix, p. 62a.)

Following notice to class members and the public, the district court issued its memorandum and order approving the settlement with regard to the merits in virtually all respects. However, the court rejected the parties' agreement with regard to attorneys' fees. The parties had negotiated and agreed to fees in the amount of $41,750, which resulted in hourly rates

for experienced counsel of $129 per hour. The district court reduced the amount to $25,600 by setting an across-the-board rate of $75 per hour for each of the three attorneys representing plaintiffs. (Appendix, 36a-43a.)

The plaintiffs moved to amend the court's order to restore the fees to the level agreed to by the parties. On February 18, 1983, the district court issued a supplemental memorandum and order denying the motion, but revising the distribution of the $25,600 awarded by a readjustment of the hourly rates to be given the three attorneys. Lead counsel was awarded $77 per hour and the other two attorneys awarded $70 and $60 per hour. (App. pp. 47a-59a.) On appeal this order was upheld by the Second Circuit, despite the state defendant's position that the

settlement should have been approved.[1/]

2. Statement of Facts

When the district court approved the settlement reached by the parties on the merits it found that it was fair and equitable and properly protected the rights of all class members. (App. 26a-36a.) The relief required the establishment of a special waiting list for minority citizens

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1/ In its Brief, the state asserted:

> Because all aspects of the settlement had been extensively reviewed and fully supported by the parties and the Attorney General of the State of New York, on behalf of the Commissioner, had evaluated and agreed to the reasonableness of the attorney's fee payable out of State funds, the District Court's rejection of the fee settlement came as a surprise. The parties had negotiated a fair and reasonable fee settlement, under the specific circumstances of the case, which was within the range of acceptable fee awards in the Circuit.

State Appellee's Brief, p. 6.

seeking units at the housing development, the elimination of the practice of giving priority to children of the existing tenants (a practice which necessarily excluded minority applicants), and the affirmative seeking of minority applicants for available housing.

It is clear from the record that an agreement on the merits was reached before any discussion of fees took place. Indeed, counsel for the plaintiffs were adamant that this procedure be followed so that there could be no question of any conflict between the interests of the class and that of counsel. The district court referred the case to a Magistrate to aid in settlement proceedings, and the Magistrate raised the question of fees after settlement on the merits had been reached, so that a complete package could be presented to the district

court. Thereafter, fee negotiations were conducted in the Magistrate's presence, and he recommended the approval of the entire settlement.

The district court found that the negotiations were at arms-length, were non-collusive, and that in no way were the interests of the class jeopardized by the agreement reached on fees. At the beginning of the fee negotiations plaintiff's counsel had sought hourly rates substantially higher than those ultimately agreed upon, and requested an adjustment to the lodestar to reflect the complexity of the case and the quality of representation. Defendant's counsel, on the other hand, opposed a multiplier and sought lower hourly rates. After considerable bargaining plaintiff's counsel agreed to a cutoff date for fees, dropped the request for a

multiplier, and the parties agreed on the total fee.

At the request of the district court counsel for plaintiffs filed an affidavit to support the negotiated fee. The submissions showed that each of plaintiffs' counsel were experienced in handling civil rights and class action litigation and had specific expertise in the field of housing discrimination. 2/

2/ Lead counsel Richard F. Bellman has practiced civil rights law since his admission to the Bar in 1963. From 1964 to 1967, he worked for the United States Commission on Civil Rights. From 1967 to 1968, he served as associate counsel for the NAACP. From 1969 to 1972, he was general counsel for the National Committee Against Discrimination in Housing. From 1972 to 1974, he was general counsel for Metropolitan Action Institute. Thereafter, Mr. Bellman became a partner in a private firm which specializes in employment and housing discrimination litigation (Joint Appendix on Appeal 84a). Mr. Bellman's affidavit listed the numerous housing discrimination cases he has handled.

Lawrence M. Grosberg became a member of the Bar in 1969. In the first five

Finally, it is clear that this case raised novel and complex legal issues. The essence of the challenge to the children's

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2/ continued

years of his practice, he was an associate in a New York law firm. From 1974 to 1979, he was managing attorney at Mobilization for Youth Legal Services. Since June 1979, he has served as director of the Columbia Law School Fair Housing Clinic and is a lecturer in law at the Law School. In conjunction with his teaching responsibilities, Mr. Grosberg specialized in housing discrimination litigation and acted as counsel to complainants or plaintiffs in more than 30 housing discrimination cases (J.S. 94a-96a).

Karen Freeman serves as general counsel for the Open Housing Center of New York, the organization which was the catalyst for the filing of this action and which plays a vital role in the implementation of the consent order. Ms. Freeman has been a member of the Bar for over eight years. She served as counsel to the Mayor's Office for Community Development in Boston, Massachusetts from 1974 through 1976. From March 1978 through April 1979, she was general counsel for the New York City Commission on Human Rights. Her role as general counsel for the Open Housing Center began in April 1979. In her capacities with the Center and the City Commission on Human Rights, Ms. Freeman has had extensive involvement in housing discrimination and fair housing litigation (J.A. 91a-93a).

list was that because the Wabasse development was predominantly white, a children's list would be predominantly white, thereby perpetuating the segregated nature of the development. Thus, it was argued that the list would have a racially discriminatory impact in violation of the federal Fair Housing Law. There was absolutely no case law involving challenges to preferential treatment for children at predominantly white housing projects. This case was apparently the first to present such an issue.[3/]

3/ Counsel argued in the motion for a preliminary injunction that the children's list should be viewed as a form of "grandfathering" analagous to actions in southern states involving discrimination in voting rights and jury selection. Plaintiffs also drew a parallel to court decisions regarding nepotism in building trade unions. Thus, in addition to precedents under the Fair Housing Act, decisions involving the Thirteenth and Fourteenth Amendments and Title VII of the Civil

The second aspect of the case raised equally difficult factual and legal issues. Plaintiffs argued that notwithstanding the fact that Warbasse was seeking to open its waiting list to outsiders, the method of publication of this action had a discriminatory effect on minority citizens. Plaintiffs asserted that Warbasse had an affirmative obligation to publish the fact of the opening of its outsiders' waiting list in the minority presses of New York City and that this duty flowed from the fact that the racial composition of the complex was overwhelmingly white. Again, there was no legal precedent on point to buttress this challenge.

3/ continued

Rights Act of 1964 were analyzed. See plaintiffs' memorandum in support of motion for preliminary injunction, dated January 5, 1980, at pp. 4-12.

REASONS FOR GRANTING THE WRIT

I.

Introduction

This case presents important issues in the growing body of law relating to attorneys' fees. Simply stated, the first issue posed is whether settlement and conciliation of attorneys' fees disputes will be encouraged, or whether they will result in protracted and major litigation and appeals. The question is not whether a district court may or, indeed should, review a settlement of attorneys' fees under the duty to supervise the settlement of the class action imposed by Rule 23(e) of the Federal Rules of Civil Procedure. Rather, it is whether once the court has determined that there has been arms' length, good faith, and non-collusive bargaining, and that the rights and interests of the class members have been

fully protected, it can substitute its judgment for that of the parties as to the appropriate hourly rate and amount. The second issue, which is essentially the same as the one presently before the Court in Blum v. Stenson, No. 81-1374 is whether the standard for awards in civil rights cases is to be different, and less favorable, than that governing in other federal litigation.

Petitioners urge that the courts below applied an erroneous standard in reviewing the fee agreement in this case and in civil rights cases generally. If allowed to stand the inevitable result of the decisions will be to encourage and, indeed, almost to require plaintiffs to engage in far more lengthy and complex proceedings when attorneys' fees are at issue. The consequence will be a greatly increased burden on the federal courts in resolving

attorneys' fees disputes as well as higher fees being paid by defendants because of the greater amount of time necessary to litigate fee matters. Further, the virtually open-ended and uncontrolled discretion given to district courts to reduce fees can only discourage attorneys from taking on civil rights cases.

II.

The Decision of the Court Below Is Inconsistent with Prior Decisions of This Court

The decision of the court below is fundamentally inconsistent with the decision of this Court in Hensley v. Eckerhart, ____U.S. ____, 76 L.Ed.2d 40 (1983). In Hensley both the majority (76 L.Ed. 2d at 53) and concurring (76 L.Ed. 2d at 64-65) opinions make clear that counsel fee matters should be dealt with in an expeditious fashion and that their voluntary

resolution is to be encouraged. The decisions of the courts below conflict with this basic principle.

Here, there is no question but that the parties negotiated fees fairly, without collusion, and at arms' length. They reached a result that was both reasonable and agreeable to all. Moreover, the record fully supports the hourly rates and the total amount awarded as reflective of the market value of the services of the attorneys involved, the novelty of the issues in the case, and the excellent results obtained. Nevertheless, the trial court rejected the settlement by essentially substituting its judgment for that of the parties as to what a reasonable fee should be. Thus, in its initial decision, the district court imposed an across-the-board $75 per hour rate with no adequate explanation of how it arrived at that rate. The

rate evidently was taken from the Equal Access to Justice Act (28 U.S.C. § 2412(d)(2)(A))[4] which Congress specifically stated should not govern civil rights cases.[5]

The decisions below would necessarily require plaintiffs to approach fee applications in a way that would result in the prolongation of attorneys' fees matters

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4/ App. p. 53a. See also, New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136 (2nd Cir. 1983).

5/ Section 206 of the Act (Pub.L. 96-481) provides that nothing in § 2412(d), including the limitation in fees to $75 per hour, "alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law . . . ." The House Report specifically states that the $75 rate "is not intended to affect or limit the computation of reasonable attorney fees under any other provision of law authorizing an award of fees for litigation under a particular statute, such as the Civil Rights Acts, designed to promote private enforcement of that Act." H.R. Rep. No. 96-1418, 96th Cong., 2d Ses., reprinted in 1980 U.S. Code Cong. & Ad. News 4984, 4994. The district court here also referred to the Criminal Justice Act, 18 U.S.C. § 3006A (1982), which also has no relevance to civil rights acts cases.

and, in many cases, their unnecessary litigation. Thus, even in cases where the parties are agreed on a fee, plaintiffs, in order to protect their interest in ensuring that the settlement will be approved, would have to submit to the district court a detailed statement of the hours, the tasks spent, the expertise of the attorneys, and data as to prevailing market rates. In short, they would have to make precisely the same showing that they would have to in a litigated fee dispute to challenge the disallowance of fees as being unreasonable or arbitrary.

The decision of the courts below would also undercut a standard practice in fee cases where only the reasonableness of the hours is at issue, i.e., stipulating as to reasonable hourly rates (see, e.g., Tasby v. Wright, 550 F. Supp. 282 (N.D. Tex. 1982)), since the district court could

look beyond such a stipulation and substitute its judgment for that of the parties. Finally, not only would the decision below result in unnecessary litigation in the district courts but, it would also result in additional appeals in those cases where the trial court had reduced fees below the amount agreed to without a sufficient basis in the record for its action.[6/]

6/ Petitioners are not suggesting that a district court, particularly in a class action, has no role except to rubber stamp an attorneys' fee settlement. Under Rule 23(e) the Court has the obligation to review any settlement of a class action and ensure that the interests of the absent class members have been adequately considered and protected. In the present case the fee negotiations were monitored by a Magistrate (who recommended approval of the amount), were not collusive, and the interests of the class members were in no way adversely affected. Under these circumstances a district court should approve the fees in the amount agreed on by the parties.

III.

The Decision Below Conflicts with The Congressional Purpose in Passing The Civil Rights Fees Provisions

Although the court below gave lip service to the principle that fees in civil rights cases should be awarded at the same levels as those in other types of litigation, the actual decision approving the reduction of the fee substantially conflicts with it. Thus, this case present issues closely similar to those now before the Court in Blum v. Stenson, No. 81-1374.

In Blum, as here, the underlying issue is whether fees are to be awarded in civil rights cases at the market rate that an attorney may command in similar types of litigation, or whether lower fees should be the norm. In both instances the problem is the same; if, in civil rights, cases fees are awarded at below market

rates then there will be a natural disincentive for attorneys to take them on.

The clear Congressional purpose, however, was to encourage the private bar (and public interest organizations), to take on the enforcement of the civil rights statutes by providing for fees at levels commensurate with those which an attorney might command in the market place.[7/]

Here, on the other hand, the courts below reduced agreed-upon fees by application of a number of principles inconsistent

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7/ Thus, Congress recognized that the "civil rights laws depend heavily upon private enforcement" (S. Rep. 94-1011, 94th Cong. 2d Sess. (1976), p. 2), and that the unavailability of fees was resulting in "private lawyers . . . refusing to take certain types of civil rights cases" because they "could not afford to do so." (H. Rep. 94-1558, 94th Cong., 2d Sess. (1976), pp. 2-3.) Therefore, the amount of fees awarded is to "be governed by the same standards which prevail in other types of equally complex Federal litigation, such as anti-trust cases . . . ." S. Rep. at p. 6.

with Congress' intent. These included the notion that fees in civil rights cases should be "moderate", presumably in comparison with fees in other types of cases. Further, when fees are awarded against a public defendant they should be lowered even, as here, when the public defendant had agreed to the amount.[8/] Finally, the "perception of the public", however it was to be determined, should be taken into account.

None of these principles have any support in the statutory language or the legislative history of the fees Act. Not only is it clear that Congress intended fees in civil rights cases to be the same

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8/ As noted above, (see n. 1, supra) the state defendant took the position in the court of appeals that the district court should be required to approve the settlement as agreed upon by the parties.

as in other types of litigation, [9] but one of its main concerns was that when a public defendant was sued public moneys, without limit, were used to defend illegal or unconstitutional acts. Thus, a central purpose was to ensure that prevailing plaintiffs in such cases recover full fees from public funds. [10]

9/ See n. 7, supra.

10/ See H. Rep. No. 94-1558, p. 7. See also, Awarding of Attorneys' Fees, Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. at 61. Congress heard specific examples. There was

> the Prince Edward County [school desegregation] case, which was one of the serious instances of contemptuous violation of law . . . . We find in that case, which has gone on for nearly 15 years, there was only one phase during the entire case during which the plaintiffs' lawyers were awarded fees paid and that amounted to $19,000.

Finally, "the perception of the public" has been expressed by the elected representatives of the public who sit in Congress. It was simply impermissible for the court below to substitute its judgment for that of the House and Senate as to what should be the governing principles for fee awards in civil rights cases.

10/ continued

> During that same period, the school board lawyers, the county lawyers and the State's lawyers were getting their fees paid in full at all times . . . . [B]ut for the same period in which the plaintiffs' lawyers were awarded $19,000, the defendants paid their lawyers $150,000 for the service of having enabled them to go into contempt of court.

The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on Representation of Citizen Interests of the Comm. on the Judiciary, United States Senate, 93rd Cong., 1st Sess. at 834-35 (1973).

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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APPENDIX

DECISION OF THE COURT OF APPEALS
Nov. 14, 1983

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 14 - August Term, 1983

Argued September 15, 1983
Decided November 14, 1983

Docket No. 83-7181

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MARY JONES, et al.,

Plaintiffs-Appellants,

v.

AMALGAMATED WARBASSE HOUSES, INC., et al.,

Defendants-Appellees.

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BEFORE:

FEINBERG, Chief Judge,
LUMBARD and NEWMAN, Circuit Judges.

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FEINBERG, Chief Judge:

This case requires us to decide the extent of a district court's discretion to modify an agreement as to attorneys' fees, otherwise awardable under 42 U.S.C. § 1988, which has been submitted to the court pursuant to Fed. R. Civ. P. 23(e) for approval as part of a proposed settlement of a class action civil rights suit. Plaintiffs Mary Jones and other class representatives appeal from a judgment of the United States District Court for the Eastern District of New York, Thomas C. Platt, J., approving in all respects a negotiated settlement of their housing discrimination suit against defendants Amalgamated Warbasse Houses, Inc. (Warbasse) and the New York State Division of Housing and Community Renewal and its Commissioner (collectively referred to as the State Division), except for the amount

of attorneys' fees, which the court reduced from a total of $41,350 to $25,600. A provision for reimbursement of $400 in costs was left undisturbed. For reasons given below, we affirm the judgment of the district court.

I.

In their complaint, plaintiffs alleged systematic exclusion of Black and Hispanic persons from a 2,585-unit publicly subsidized housing development in violation of the Thirteenth and Fourteenth Amendments to the United States Constitution; Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq.; 42 U.S.C. §§ 1981-1983; and the New York Human Rights Law, N.Y. Exec. Law § 296(2-a) (McKinney 1982). The housing complex is operated by defendant Warbasse, a limited profit mutual housing company supervised by defendant State Division. Plaintiffs requested, and

the settlement order granted, certification pursuant to Fed. R. Civ. P. 23(b)(2) as representatives of the class of all Black and Hispanic (Caribbean and Central American) persons who have sought or may seek to live in the Warbasse complex. Plaintiffs sought preliminary and permanent injunctive relief, actual and exemplary damages for the named plaintiffs, and other relief. Defendants moved to dismiss the complaint, and the district court reserved decision on the preliminary relief sought and the motions to dismiss pending the outcome of settlement negotiations.

The case was referred to Magistrate A. Simon Chrein, who assisted in the later stages of the negotiations on the substantive claims and in the entire negotiations concerning attorneys' fees. The parties agreed to, and submitted to the court for approval, a proposed order that provided

significant relief to the class in the form of revised procedures for filling vacancies, including the establishment of a minority waiting list and the elimination of a special waiting list for children of existing tenants. The district court found that these procedures will virtually insure that nearly a tenth of the units will be filled by class members. The proposed orders also incorporated the defendants' agreement to pay attorneys' fees of $41,350 and costs of $400.

After notice of the proposed settlement was published in the minority press and mailed to all applicants on the existing waiting lists, written comments were received and a hearing was held. Thereafter, in a memorandum and order dated November 15, 1982, the court approved the proposed settlement and order. The Court found that there was no evidence to suggest

collusion among the opposing attorneys in formulating the settlement, that the attorneys had sufficient experience in class action litigation to arrive at a fair and reasonable compromise, that the decisions of the attorneys were informed, that no class members had objected, and that the interests of the class members were served. With respect to the attorneys' fees provided for in the settlement, however, the court expressed concern that the proposed fees "seemed out of line with other matters which it has been called upon to review." Citing Selzer v. Fleisher, 629 F.2d 809 (2d Cir. 1980), rev'g Selzer v. Berkowitz, 477 F. Supp. 686 (E.D.N.Y. 1979), cert. denied, 451 U.S. 970 (1981), and other authority, the court reduced the fees from approximately $129 per hour to approximately $75 per hour, and the total fee requested of $41,350 plus $400 in

costs to $25,600 plus $400 in costs. Adopting the same proportion used in the negotiated settlement, the court allocated $15,880 of this total to be paid by defendant Warbasse and the remaining $10,120 by defendant State Division.

Thereafter, plaintiffs' attorneys moved to amend the November 15 order by restoring the fees to the negotiated level. In a supplemental memorandum and order of February 18, 1983, the court considered and rejected a number of arguments by plaintiffs' counsel in support of the higher fees and provided a more extended explanation for the figure it had set and now declined to increase. In particular, the court explained that in fact it had followed the two-step "lodestar" approach called for by City of Detroit v. Grinnell Corporation, 495 F.2d 448, 470-71 (2d Cir. 1974)(Grinnell I) and City of Detroit v.

Grinnell Corporation, 560 F.2d 1093, 1098-99 (2d Cir. 1977)(Grinnell II). The court also refined the $75 per hour average on which the figure was based to provide $77 per hour to the lead attorney, Richard F. Bellman of Steel & Bellman, P.C., and $70 per hour and $60 per hour, respectively, to the other two attorneys in the case, Lawrence Grosberg of the Columbia University Fair Housing Clinic and Karen Freeman of the Open Housing Center of New York.

II.

Both plaintiffs and the State Division argue that the district court abused its discretion in setting aside the agreement as to attorneys' fees. They acknowledge the role of the court in guarding against collusion, inexperienced counsel, inadequate information, adverse class impact and windfall. Plaintiffs maintain, however,

that once they have determined that a proposed settlement is not tainted in any of these respects, the judge is not free to set aside a fee agreement negotiated by the parties at arms' length that falls within a range of fairness and reasonableness. Plaintiffs also point to the judicial policy favoring out-of-court settlement and argue that a presumption in favor of a negotiated fee agreement attaches when there is no finding of irregularity, lest the incentive to settle be undermined. The State Division offers similar reasoning, maintaining that a settlement of fees, like a settlement on the merits, imposes some limits on the reviewing court's discretion. It further argues that a fee agreement negotiated by a responsible public official, such as the State Attorney General, who is charged with protecting the interests of state residents and taxpayers,

should not lightly be rejected. Defendant Warbasse argues that the court has a duty to make an independent evaluation of the reasonableness of the attorneys' fees regardless of the parties' agreement and that the court did not abuse its discretion in reducing the fees to the amount it found reasonable.

We reject the argument that the district judge, in light of his findings, could not reduce the fee award. It must be emphasized that a district court has broad discretion to determine the amount of a fee award to be made pursuant to 42 U.S.C § 1988. Hensley v. Eckerhart, 103 S.Ct. 1933, 1941-42 (1983); Gagne v. Maher, 594 F.2d 336, 344 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980). The presence of an arms' length negotiated agreement among the parties weighs strongly in favor of approval, but such an agreement is not

binding on the court. Piambino v. Bailey, 610 F.2d 1306, 1328 (5th Cir.), cert. denied, 448 U.S. 1011 (1980); Foster v. Boise-Cascade, Inc., 577 F.2d 335 (5th Cir. 1978)(per curiam), aff'g 420 F. Supp. 674 (S.D. Tex. 1976); Levin v. Mississippi River Corp., 377 F. Supp. 926, 930-31 (S.D.N.Y.)(Weinfeld, J.), aff'd, 508 F.2d 836 (2d Cir. 1974), cert. denied, 429 U.S. 833 (1976). A district court's discretion is not limited to situations in which it finds windfall, adverse class impact, or other irregularity in a fee agreement. Despite the absence of such factors, if the court finds good reason to do so, it may reject an agreement as to attorneys' fees just as it may reject an agreement as to the substantive claims. The court's perspective and obligations are different from those of the parties. Malchman v. Davis, 706 F.2d 426, 435-36 (2d Cir. 1983);

Grinnell I, 495 F.2d at 469-70; Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045, 1049-51 (2d Cir.), cert. denied, 414 U.S. 1092 (1973). The judge's duty to safeguard the public interest is especially important when no class members are likely to object and the aggregate impact of a settlement is greater than the impact on any one defendant. Thus, this court has indicated that fee awards under § 1988 should be moderate, see Grinnell I, 495 F.2d at 469-70, and additionally that a court has an obligation under Fed. R. Civ. P. 23(e) in any class action to make sure that a class is taken care of fairly, especially in a settlement where no one is likely to complain.

On the other hand, the court must consider competing policies as well. There is the congressional policy favoring fee awards in order to enforce the civil rights

laws by private litigation. See McCann v. Coughlin, 698 F.2d 112, 128 (2d Cir. 1983); Mid-Hudson Legal Services, Inc. v. G & U, Inc., 578 F.2d 34, 36-37 (2d Cir. 1978). Fee shifting is still not that common and a statute specifically authorizing it should not be construed in a niggardly manner. Moreover, there is the important policy of encouraging settlements. See Hensley v. Eckerhart, 103 S.Ct. at 1941. The settlement process is undermined if the court attaches little weight to the fact that the parties have reached an agreed figure reflecting, as in this case, compromise on both sides. In exercising its discretion, the district court must reconcile these policies on the facts of each case. In deciding whether to accept fee settlements, the court should treat them essentially as it treats settlements on the merits, according them a presumption of regularity

once it finds no impropriety, but aware that the presumption can be overcome for good reason, including the impact on the class, the public perception of the appropriateness of the fees, and the range of awards allowed in similar cases. Once a court has decided that a fee settlement should not be accepted, we think it need not limit itself to the alternative of outright rejection, but may exercise its discretion to determine a reasonable fee. The court has a special responsibility to supervise the matter of attorneys' fees in class actions and in any litigation involving a fee-shifting statute like section 1988. Even in a case such as this, where any decrease in the amount of the fees will not inure to the benefit of the plaintiff class, which received only injunctive relief, the court's downward revision of a fee settlement unacceptable to the court

will promote confidence in the integrity of the judicial process and is a proper exercise of authority over officers of the court in litigation pending before the court.

In the instant case, the district court carefully considered the many factors relevant to a decision whether to accept or reject a fee settlement and set out its reasons for rejecting the fees agreed upon and for making a reduction. See Johnson v. Georgia-Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974, cited with approval in Hensley v. Eckerhart, 103 S.Ct. 1937-38. We note that the court also mentioned the participation of a governmental agency in the negotiations and its endorsement of the results as "a factor weighing heavily in favor of settlement approval." We believe that the court did consider as significant the fact of settle-

ment of the fee dispute as well as of the underlying dispute. While not all of us would have reduced the fee award when, as here, a federal magistrate assisted in the negotiations and the State Attorney General joined in the negotiations and the agreement, we all agree that on this record we cannot say that the court abused its discretion in doing so.

III.

Plaintiffs' remaining arguments require little discussion. Plaintiffs argue that the court erroneously reduced the fee award in part because public funds were involved. We have no reason to doubt the judge's explanation in his supplemental memorandum and order that this fact caused him to scrutinize the fee arrangement with more care, but was not a reason for the reduction. Plaintiffs also contend that the court did not follow the two-step

"lodestar" approach mandated by Grinnell I, 495 F.2d at 470-71, and Grinnell II, 560 F.2d 1098-99. While it is true that rates awarded to civil rights counsel should ordinarily be on par with market rates for private attorneys engaged in other complex federal litigation, S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S Code Cong. & Ad. News, 5908, 5913; New York State Association for Retarded Children, Inc. v. Carey, No. 82-7531, slip op. at 4563, 4587 (2d Cir. June 15, 1983), and it is preferable for the district court to make express findings as to what those rates are, we believe the court satisfied this requirement by looking to the hourly rates awarded in comparable recent cases. We do not need to reach the arguments concerning the adequacy of counsel's time records because, despite passing reference to this issue in

a footnote of its supplemental memorandum and order, the court did not rely on inadequacy of time records in reaching its decision. It is worth noting, however, that the burden is on counsel in the first instance to submit detailed contemporaneous time records. New York State Association for Retarded Children, Inc. v. Carey at 4582-84; Hensley v. Eckerhart, 103 S.Ct. at 1943 (Burger, C.J., concurring); McCann v. Coughlin, 698 F.2d at 131.

The judgment of the district court is affirmed.

MEMORANDUM AND ORDER

OF DISTRICT COURT, Nov. 15, 1982

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CV 80-344

MEMORANDUM & ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARY JONES, BEVERLY HARRIS, ERNEST SIMMONS, MILDRED MALLOY, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

- against -

AMALGAMATED WARBASSE HOUSES, INC., NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendants.

==========

PLATT, D.J.

The parties to this would-be class action seek approval of an Order and Judgment of Consent (settlement agreement) submitted pursuant to Fed. R. Civ. P.

23(e). No class members objected to the proposed settlement at a hearing on October 15, 1982, and none submitted opposition in writing. For this reason and those that follow, the agreement will be approved.

I. Introduction

Plaintiffs allege that Amalgamated Warbasse Houses, Inc. (Warbasse), a limited-profit mutual housing company located near the Coney Island section of Brooklyn, and the New York State Division of Housing and Community Renewal (Division)[1/] systematically prevented Black and Hispanic citizens from obtaining apartments at the 2,585-unit Warbasse complex, thereby violating the Thirteenth and Fourteenth Amendments to the United States Constitution, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq. (1977)), 42 U.S.C. §§ 1981-1983 (1981), and the New York Human Rights Law

(N.Y. Exec. Law § 296(2-a)(McKinney 1982).

This action was commenced on December 16, 1980. Shortly thereafter, both defendants moved to dismiss, while the plaintiffs sought injunctive relief. However, decision was reserved pending the outcome of settlement talks initiated, or at least encouraged, by Division Commissioner Richard Berman, a co-defendant. Magistrate A. Simon Chrein subsequently assisted in the negotiations, and on August 9, 1982 the parties submitted the proposed settlement agreement. This Court thereupon ordered that notice of the settlement be published in the minority press and mailed to each of the approximately 1,570 apartment applicants on the Warbasse waiting list. Comments were to be submitted by October 8, 1982. The hour-long hearing took place a week later.

II. The Settlement Agreement

As an initial matter, plaintiffs are to be certified pursuant to Red. R. Civ. P. 23(b) (2) as representatives of the class of all Hispanic (Caribbean and Central American) and Black persons who have sought to may seek to live in the Warbasse complex.[2/] Order and Judgment of Consent, ¶ 2.[3/]

Second, to compensate for past underrepresentation of class members at Warbasse, defendants will establish a minority list and fill 215 apartments from it. Applications will be solicited through notice in the general and minority media. The list is to be divided by apartment size into three groups: 121 one-bedroom units, 67 two-bedroom units, and 27 three-bedroom units. According to preference, individuals will be placed in one of these groups, in the order in which their applications

are received.[4] Then they will be "shuffled" into the existing (outsiders') list of non-Warbasse residents waiting for units, in the following ratios: one minority applicant to five outsiders for one-bedroom units; two minority applicants to seven outsiders for two-bedroom units; and one minority applicant to three outsiders for three-bedroom units. ¶¶ 6(c)(ii), 11. In each case, the minority applicant or applicants will be selected before the individuals on the outsiders' list[5] ¶¶ 11, 12. When the 215th unit is filled, the minority list will cease to exist.[6]

Third, Warbasse residents will continue to receive priority in seeking transfers to other units within the complex. ¶ 9.

Fourth, the "children's" list is to be closed, and those currently on it will

be "shuffled" into the outsiders' list, five outsiders to every child.[7/] ¶ 10. Heretofore, the former has placed the sons and daughters of Warbasse residents in a preferred position.

Fifth, the outsiders' list -- for which income is the only admission criterion -- will be maintained, although applicant solicitation is to be extended to the minority press. ¶ 24. Class members both on and off the minority list may apply for admission to the outsiders' list on equal terms with all others. However, no one will be permitted to remain on both lists. ¶ 25. Moreover, each minority group member beyond 100 on the outsiders' list will reduce by one the total number that Warbasse must accept from the minority list. ¶ 25.

Finally, defendants have agreed to pay plaintiffs' attorneys' fees and costs

totaling $41,750. ¶ 27. This will be reduced to $26,000, a matter discussed in Part IV.

III. Discussion

To win court approval, a class action settlement generally "must be fair and reasonable and in the best interests of all those who will be affected by it." 7A C. Wright & A. Miller, Federal Practice and Procedure § 1797, at 229 (1972) [hereinafter cited as Wright & Miller]. See Weinberger v. Kendrick, No. 81-7317, slip op. at 3944-45 (2d Cir. July 14, 1982) (Friendly, J.), aff'g 91 F.R.D. 494 (S.D. N.Y. 1981); Tornabene v. General Development Corp., 88 F.R.D. 53, 61 (E.D.N.Y. 1980), aff'd mem., No. 80-9044 (2d Cir. March 3, 1981), modified (July 31, 1981); West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710, 740 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert.

denied, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971). While the settlement proponents bear the burden of demonstrating fairness, 7A Wright & Miller § 1797, at 229 "[v]oluntary out of court settlement of disputes is 'highly favored in the law,'" Wellman v. Dickinson, 497 F. Supp. 824, 830 (S.D.N.Y. 1980) (quoting D.H. Overmyer v. Loflin, 440 F.2d 1213, 1215 (5th Cir.), cert. denied, 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90 (1971)), aff'd, 682 F.2d 355 (2d Cir. 1982); Newman v. Stein, 464 F.2d 689 (2d Cir.), cert. denied, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972); see Tornabene v. General Development Corp., supra, and "approval of class action settlements will be generally left to the sound discretion of the trial judge." Wellman v. Dickinson, 497 F. Supp. 824 at 830 (citations omitted). This is particularly true in Fair Housing Act cases, where

the alternative to voluntary agreement -- a court-ordered injunction -- may inhibit cooperation and voluntary compliance. Williamsburg Fair Housing Committee v. New York City Housing Authority, 450 F. Supp. 602, 606 (S.D.N.Y. 1978). See Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, 94 S.Ct. 1011, 1017-18, 39 L.Ed.2d 147 (1974) (Title VII). Moreover, a proposed settlement "carries ... its own presumption of regularity and is subject to approval by the trial court after hearing proferred objections." Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1013 (7th Cir. 1980)(consent decree in discriminatory zoning case). Thus, the court will not substitute its judgment for that of counsel who, after the type of arm's-length bargaining that took place in this case, "have made a determination that the settlement repre-

sents a fair and real appraisal of their clients' chances of ultimate success." Siegel v. Realty Equities Corp. of New York [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,102, at 94,446 (S.D.N.Y. 1973). See Weinberger v. Kendrick, supra, slip op. at 3946 (examination by court of settlement's substantive terms necessarily must be limited).

Nevertheless, when reviewing a class action settlement the District Court also is "'a fiduciary who must serve as a guardian of the rights of the absent class members.'" City of Detroit v. Grinnell Corp., 560 F.2d 1093 (2d Cir. 1977)(quoting Gruinin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975), cert. denied, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975)). In fulfilling its role, the court looks to the following factors: (1) the presence of collusion in

reaching the settlement; (2) counsel's experience in handling similar cases; (3) the extent of discovery and its impact on counsel's ability to make an informed decision as to the merits of the case and the fairness of the settlement; and (4) the objections of class members. George v. Parry, 77 F.R..D. 421 (S.D.N.Y.) (civil rights action), aff'd mem., 578 F.2d 1367 (2d Cir.), cert. denied, 439 U.S. 947, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978); Bacote v. Long Island Savings Bank, No. 78 Civ. 1285, at 1 (E.D.N.Y. Sept. 1, 1982); Connolly v. New York City Transit Authority, No. 74 Civ. 1085, at 4 (E.D.N.Y Jan. 26, 1982); Tornabene v. General Development Corp., supra; Duban v. Diversified Mortgage Investors, 87 F.R.D.. 33, 38-41 (S.D.N.Y. 1980); Munsey Trust v. Sycor, Inc., 457 F. Supp. 924, 926 (S.D.N.Y. 1978); Feder v. Harrington, 58 F.R.D. 171 (S.D.N.Y. 1972).

These factors need not be exhaustively analyzed in this case, for it is amply clear that the settlement survives scrutiny.

First of all, not one grain of evidence suggests that opposing counsel colluded in drawing up the 19-page settlement agreement. In the absence of such evidence -- at least where the proposed agreement on its fact suggests that a bona fide compromise has been crafted -- the settlement is presumed to be regular. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d at 1013-15. Here, many signs of compromise exist. Not only did the named plaintiffs initially seek damages in addition to injunctive relief, but the relief requested for the entire, open-ended class could have been equally open-ended (at least in duration), and it could have involved far more than 215 units (6 percent of the

total) at Warbasse. Moreover, class members will not be given full priority over others on the outsiders' list. Rather, as described above, they will be "shuffled" into the pack, in adjustable ratios now ranging from one:three to one:five. Current residents, virtually all of whom could never become members of the minority class, will continue to receive full priority with regard to internal transfers.[8/]

At the same time, plaintiffs have obtained significant relief -- the virtual guarantee that nearly a tenth of the units at the Warbasse complex will be occupied by members of minority groups. Merely by way of observation, we note that these 215 minority units may provide the "critital mass" needed to create and maintain a more heterogenous community at Warbasse.

Second, we find that counsel have had

sufficient experience in class action litigation to arrive at a fair and reasonable compromise. The lead attorney for the class was ably assisted by lawyers from the Fair Housing Clinic at Columbia University and the Open Housing Center. On the other side, attorneys representing Warbasse received assistance from the New York State Division of Housing and Community Renewal. That a government agency participated in successful compromise negotiations and endorsed their results is a factor weighing heavily in favor of settlement approval -- at least where, as here, the agency is "committed to the protection of the public interest." Wellman v. Dickinson, 497 F. Supp. 824 at 830 (SEC participation).

Third, it is clear from the affidavits accompanying the several motions that the attorneys have made an informed decision as to the merits and the fairness of the

compromise. Although little formal discovery has occurred, the parties freely exchanged data during settlement talks.[9/] In view of the way this speeds the negotiation process, informal "discovery" is to be encouraged. Settlement is particularly appropriate where these preliminary inquiries indicate that the litigation will be long and complex, and the outcome far from certain. Beecher v. Able, 72 F.R.D. 518, 520 (S.D.N.Y. 1976)(Motley, J.), mod., 441 F. Supp. 426 (S.D.N.Y. 1977), aff'd, 575 F.2d 1010 (2d Cir. 1978); West Virginia v. Charles Pfizer & Co., Inc., supra.

The final and "crucial" factor in evaluating the fairness of the settlement agreement is whether the interests of the class members have been taken into account. 7A Wright & Miller ¶ 1797, at 182 (Supp. 1982). To ascertain this, the court should

consider how knowledgeable plaintiffs' attorneys were, and whether opponents presented persuasive argument sagainst the settlement. We concluded above that plaintiffs' attorneys are well-informed. Moreover, not a single class member submitted a written statement prior to or appeared at the hearing on October 15, 1982. This leads to only one, obvious concusion: that the class supports the settlement.

Although one oral and five written objections were submitted by non-class members,[10/] the ocurt has serious doubts as to whether it must consider these comments, see Kusner v. First Pennsylvania Corp., 74 F.R.D. 606, 611 (E.D. Pa. 1977) (settling oefendant's shareholder not permitted to intervene and object), aff'd mem., 577 F.2d 726 (3d Cir. 1978), particularly where, as where, State law grants Warbasse the power to sue and be sued, N.Y.

Priv. Hous. Fin. Law § 17(1)(j) (McKinney 1976). These individuals may continue to pursue whatever rights they may have to force Warbasse to redress allegedly improper actions taken in settling this lawsuit. Moreover, even assuming that the objections must be considered, we find that they do not alter the outcome. First of all, the six opponents comprise only a tiny fraction (0.38 percent, to be precise) of those currently on the outsiders' list, and surely a tinier one when compared to the numer of persons presently in the certified class. Second, most of these comments make one point: that each individual earned his place on the waiting list and that settlement approval will interfere impermissibly with this "entitlement." The short, and sole, answer is that no such entitlement exists. Outsiders are not being forced to

forfeit their status as members of the list; rather, they merely may have to wait somewhat longer for an apartment. This potential delay is not legally significant and therefore does not provide a basis for disapproving the settlement. See, e.g., Franks v. Bowman Transportation Co., 424 U.S. 747, 775-78, 96 S.Ct. 1251, 1269-71, 47 L.Ed.2d 444 (1976) (union seniority system). Put another way, although opponents complain that the glass is now half empty, it is really half full: The settlement might have eliminated the outsiders' list entirely, and in the process return each person on it to parity with all new applicants.

IV. Attorneys' Fees

Plaintiffs' attorneys have requested attorneys' fees of $41,350 and costs of $400, or a total of $41,750 for their

services in this matter. Lead counsel, Richard S. Belman, Esq. in an affidavit sworn to October 18, 1982, has stated that he spent 241 hours, that Lawrence Grosberg, Esq., of the Fair Housing Clinic at Columbia University, spent 60 hours and that Karen Freeman, Esq., of the Open Housing Center, spent 20 hours working on this case. He sets the value of their services at approximately $129 per hour. By his own admission, however, Mr. Belman states that "A substantial portion of my work related to [the] negotiations" which led ultimately to the proposed consent now before this Court. Mr. Belman does state that the fees themselves were the subject of negotiations between the parties and that they were ultimately agreed to by counsel for the defendants herein. In this case, if the defendants were private parties dealing with private funds this Court might

be tempted to assume "reasonableness" and to accept the results of these negotiations in the absence of any indication of collusion. However, here both defendants, for the most part at least, are dealing with taxpayers' funds. Under these circumstances, this Court feels constrained to scrutinize the attorneys' request with more care.

As an initial matter, once a court has determined that attorneys' fees are to be awarded, the amount of the award is within the discretion of the court. Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), cert. denied, 423 U.S. 844, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975); 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 23.91, at 23-566 (2d ed. 1982). This discretion, however, is not unbounded. Factors that a trial judge should consider in computing a fee award include

the following:

(1) The time and labor required.

(2) The novelty and difficulty of the questions.

(3) The skill requisite to perform the legal service properly.

(4) The preclusion of other employment by the attorney due to acceptance of the case.

(5) The customary fee.

(6) Whether the fee is fixed or contingent.

(7) Time limitations imposed by the client or the circumstances.

(8) The amount involved and the results obtained.

(9) The experience, reputation, and ability of the attorneys.

(10) The "undesirability" of the case.

(11) The nature and length of the professional relationship with the client.

(12) Awards in similar cases.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974); Selzer v. Berkowitz, 477 F. Supp. 686 (E.D.

N.Y. 1979). After taking into account each of these factors, we are convinced that a fee reduction is in order. It should be stressed that

> [e]ven where there has been no objection to the size of the attorney's fee requested, it is the responsibility of the court to see to it that the size of the award is reasonable.

3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 23.91, at 23-568 (2d ed. 1982). See 42 U.S.C. § 1988 (1981) (court may award "reasonable" attorney's fee to prevailing party in civil rights action).

This court is particularly concerned that the requested fees seem out of line with other matters which it has been called upon to review. For example, in Selzer v. Fleisher, 629 F.2d 809 (2d Cir. 1980), rev'g Selzer v. Berkowitz, 477 F. Supp. 686 (E.D.N.Y. 1979), cert. denied, 451 U.S. 970 (1981), also a civil rights case, the plaintiff was represented by the

firm of Donovan Leisure Newton & Irvine, 30 Rockefeller Plaza, New York, and Walter L. Stratton, Esq., one of the senior trial partners in that firm (also a very experienced trial lawyer) who tried the case, valued his and his partners' time at $125 per hour and the time of his associates and others at substantially less per hour.[11/] By way of contrast to the case at bar, both sides in that case took extensive depositions, conducted protracted and complicated pretrial discovery and briefed and argued numerous complex legal questions before, during and after the eight-week jury trial, which resulted in a substantial verdict for the plaintiff. When this Court in that case approved the indicated attorneys' fees of $125 per hour and less, the Court of Appeals for this Circuit implied that these fees were excessive in the following language:

> Appellants challenge as excessive the trial court's award of attorneys fees in the amount of $433,458.78. In the event that the trial court is again called upon to fix attorneys fees, we are confident it will note, as this Court has recently suggested in Seigal v. Merrick, 619 F.2d 160, 164, Nos. 79-7420, 79-7444 (2d Cir. 1980), that any award must be proportionate to the result achieved.

629 F.2d at 814 (footnote omitted). See also Tornabene v. General Development Corporation, supra (court reduced fees and costs to 36 percent of figure agreed to by defendants). The work involved in this case does not begin to measure up to the complexity and difficulty of the work in that case. Moreover, the results achieved in that case were on a comparative basis substantially greater than the results achieved here. Under these circumstances, this Court feels it is compelled to reduce the hourly rate rquested by the plaintiffs from approximately $129 per hour to approximately $75 per hour, yielding the

plaintiffs' attorneys a gross fee of $24,000 plus $400 in costs. In order to make an allowance for any additional work that may be necessary in connection with the implementation of the order herein, the Court will round the gross fee to $25,600 plus $400 in costs, or a total of $26,000.

Based upon the proportion heretofore adopted between the defendants, the amount of the $26,000 allocable to the defendant Warbasse will be $15,880 and the amount allocable thereof to the Division will be $10,120.

SO ORDERED.

UNITED STATES DISTRICT JUDGE

1/ As a Mitchell-Lama project (see N.Y. Priv. Hous. Fin. Law § 10 et seq. (McKinney 1976)), Warbasse is supervised by the New York State Division of Housing and Community Renewal (the Division).

2/ According to data developed by the Division, 99 percent of the residents of Warbasse were White and 1 percent were members of minority groups as of July 10, 1980. Affidavit of Edmund Davis, exhibit 1.

3/ Hereinafter, references to the proposed settlement will be by paragraph number only.

4/ The four named plaintiffs have 30 days from the entry of the Order and Judgment on Consent to request placement at the top of the minority list. ¶ 6(f). No objections to this provision have been filed, and even if they had been, disapproval would not be warranted since the advantage is not excessive. Luevano v. Campbell, 93 F.R.D. 68, 89 (D.D.C. 1981); Bacote v. Long Island Savings Bank, No. 78 Civ. 1285, at 5 (E.D.N.Y. Sept. 1, 1982). Moreover, minorities presently on the outsiders' list may request placement on the minority list in their existing order, although in back of the named plaintiffs who exercise their option. ¶ 6(f).

5/ The settlement provides for subsequent adjustment of these ratios to ensure that all the units in each category are filled at approximately the same time. ¶ 23.

6/ Subject to Division approval, the agreement permits Warbasse to place up to 100 additional names on "reserve status." ¶¶ 6(c)(iv), 7. Conversely, if too few minority group members apply for housing, the agreement obligates Warbasse to solicit applicants on up to three additional occasions. ¶8.

7/ Until now, one name has been taken from the children's list for every five names taken from the outsiders' list. Thus, those presently on the children's list will lose nothing vis-a-vis outsiders.

8/ See supra note 2.

9/ Plaintiffs' interrogatories to Warbasse and to the Division went unanswered. Neither side took depositions. However, plaintiffs apparently sought to demonstrate discriminatory impact, an approach that might well find most useful the type of data amply provided by way of affidavit and appendix thereto.

10/ Five currently are on the outsiders' or the children's list, while the sixth wrote on behalf of a parent on

10/ continued

the outsiders' list. We emphasize that everyone on an existing waiting list received mailed notification of the proposed settlement, comment deadline, and hearing date.

11/ In that case, plaintiffs' counsel spent 5,481.25 hours of attorney time plus 2,118.25 hours of para-attorney (i.e., summer associates, student interns, and paralegals) time. As we pointed out in our opinion, the average legal and para-legal time charge there was $60.00 an hour. 477 F. Supp. at 690-91 & n.3.

SUPPLEMENTAL MEMORANDUM AND ORDER
OF DISTRICT COURT, Feb. 18, 1983

CV 80-3444

SUPPLEMENTAL MEMORANDUM & ORDER

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARY JONES, BEVERLY HARRIS, ERNEST SIMMONS, MILDRED MALLOY, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

- against -

AMALGAMATED WARBASSE HOUSES, INC., NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendants.

==========

PLATT, D.J.

At issue is the fee award ordered in the settlement of a housing discrimination class action. Defendants Amalgamated Warbasse Houses, Inc. (Warbasse) and the

New York State Division of Housing and Community Renewal (Division), in settling the case, agreed to a total of $41,350 in fees. In a Memorandum & Order dated November 15, 1982 (the November 15 Order), the Court approved all aspects of the settlement except for the fee agreement. On that score, we reduced the total figure to $25,600, which -- after including $400 in costs not affected by the reduction -- was allocated as follows: $15,880 to be paid by Warbasse and $10,120 by the Division. Looked at another way, the fee as reduced will provide compensation at the rate of $75 an hour (not including $1,600 for additional work to be performed); the pre-reduction rate was approximately $129 an hour.

Pursuant to Fed. R. Civ. P. 59(e), plaintiffs' attorneys seek to amend the November 15 Order by restoring the award to

its negotiated level. The fee reduction is attacked on numerous grounds. The more significant among these are that (1) in recent settlements of a like nature, courts have authorized awards equal to or exceeding the negotiated amount; (2) significant time was devoted to drafting pleadings, pre-trial motion practice, and discovery -- in short, to matters some would argue are more complex than settlement negotiations; (3) settlement of this particular class action was as difficult as more highly remunerated settlements because it involved intricate and novel issues; (4) all three attorneys, and especially lead counsel Richard P. Bellman, possess great expertise and experience in fair housing and class action litigation; and (5) contrary to this Court's asserted conclusion, the portion of the award paid by Warbasse will not directly or indirectly

affect State taxpapers.

After considering these points, the subsidiary matters, we conclude that the fee reduction was appropriate and hence decline to amend the November 15 Order.

It is important initially to note that, while Courts have only limited discretion to deny fees to settling plaintiffs, their discretion in determining the amount of the award is quite broad. Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), cert. denied, 423 U.S. 844, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975). We certainly are not bound by the negotiated settlement, Levin v. Mississippi River Corp., 377 F. Supp. 926, 931 (E.D. N.Y. 1974), and to the extent our discretion is limited, it is limited by the obligation to ensure that the fee award is reasonable -- indeed moderate. Selzer v. Fleisher, 629 F.2d 809, 814 (2d Cir.

1980); City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1947). 42 U.S.C. § 1988 (1981).

Considering the objections in order, it is not true, in the first place, that in all recent settlements of civil rights cases courts have awarded fees at a higher rate. While some have, e.g., Bradford v. Blum, 507 F. Supp. 526 (S.D.N.Y 1981)($125 an hour for experienced private counsel), others have not, e.g., Cleary v. Blum, 507 F. Supp. 514 (S.D.N.Y. 1981)($75 an hour for experienced private counsel). As the Second Circuit recently had occasion to point out, a fee award need not be set at "the rate which a lawyer charges his other clients." McCann v. Coughlin, Nos. 82-2213, 82-2220, slip op. at 1153 (2d Cir. Jan. 6, 1983). The award here is well within the range of reasonableness. This is particularly true given the fact

that lead counsel Bellman, who has practiced law for about 20 years, with 15 years' experience in civil rights litigation, billed only 241 of the 321 hours plaintiffs' counsel had logged by the time the settlement agreement was completed. The remainder was billed by less experienced counsel, Lawrence M. Grosberg (13 years of practice, eight in the civil rights area), and Karen Freeman (about eight years of practice, six in civil rights). The $25,600 award represents a $75-an-hour rate of compensation. This is a fair average, considering both the facts that lead counsel billed only three-quarters of the total number of hours logged, and that the $75 across-the-board figure includes all work, from the most routine to the most challenging. In addition, the fee here is in line with the $60 an hour fee award granted by this Court

in Selzer v. Berkowitz, 477 F. Supp. 686, 690-91 (E.D.N.Y. 1979), and discussed in the November 15 Order.[1/] Moreover, we note that two analogous attorney fee statutes, although not controlling here, support the conclusion that a $75-an-hour average is adequate, to say the least. The first, the Equal Access to Justice Act, Pub. L. 96-481, Tit. II, § 203 (to be codified at 28 U.S.C. § 504) and § 204 (to be codified at 28 U.S.C. § 2412), imposes a fee ceiling of $75 an hour against federal defendants, absent a showing of special circumstances.[2/] The second, the Criminal Justice Act, 18 U.S.C. § 3006A (1982), limits compensation to $30 an hour for in-court time, and $20 an hour for reasonable out-of-court time, for attorneys appointed to the constitutionally vital task of representing indigent criminal defendants -- situations in which a per-

son's liberty usually is at stake. 18 U.S.C. § 3006A(d)(1).[3/]

Plaintiffs also assert that the award was established without first designating a "lodestar" figure -- the fee that attorneys of similar experience would receive for like work -- and then adjusting the total to take into account such factors as the risk and complexity of the litigation. See Cohen v. West Haven Board of Police Commissioners, 638 F.2d 496, 505 (2d Cir. 1980). However, the November 15 Order show the result of applying the two-step Cohen analysis;[4/] and although counsel has now supplied the Court with additional detail, it does not change the result. To be explicit, the $25,600 total -- taking into account each attorney's litigation (and especially civil rights) experience described above -- is calculated according to the "lodestar" method, as follows: Mr.

Bellman, who spent 241 hours on this case, is to be compensated at the rate of $77 an hour, for a sub-total (see infra) of $18,557; Mr. Grosberg, who spent 60.5 hours, at $70 an hour, for a total of $4,235; and Ms. Freeman, who spent 20.5 hours, at $60 an hour, for a total of $1,230. Adding the total for each attorney in turn yields $24,022 which, rounded to $24,000 is $1,600 less than the $25,600 award. Counsel has advised the Court that further work will be necessary to implement the order. The additional $1,600 will be allocated to Mr. Bellman as payment for this work. At his $77 rate, this provides for 20.8 extra hours.[5/]

After considering adjustment of each "lodestar," we conclude that they should remain as they are in view of (1) the comparatively small risk involved for plaintiffs' counsel; (2) the relatively

uncomplicated nature of the litigation; and (3) the fact that the settlement represents a compromise -- plaintiffs did not "win." See Selzer v. Fleisher, 629 F.2d at 814 ("any award must be proportionate to the result achieved").

Plaintiffs' second essential objection -- that, contrary to the asserted implication of the November 15 Order, significant time was devoted to matters putatively more complex than settlement negotiations -- is an extension of the first. Mr. Bellman has submitted an affidavit stating that only 114 of his 241 hours were devoted to the settlement process. The remainder was spent in initial work with the plaintiffs (preparing, filing, and amending the complaint) (30.5 hours); pretrial interrogatories (19.67 hours); motion for preliminary injunction (43.32 hours); and opposing motions to dismiss (33.75 hours).[6/] However,

we did not mean to (and believe we did not) imply that negotiation is less difficult than other preliminary litigation matters. Rather, in addition to counsel's experience, the key factor in determining the rate of compensation was that this lawsuit was settled before it became necessary to take extensive depositions, brief numerous legal points, or prepare for the -- most importantly -- conduct a protracted jury trial. Compare Selzer v. Berkowitz, supra.

Plaintiffs' third and fourth objections are, we believe, adequately answered by the above discussion. The abstract complexity of the issue is less important than the type of work performed, and the result achieved. These factors have already been considered. Moreover, although counsel's qualifications are not in doubt, we believe that the approved compen-

sation accurately reflects those qualifications.

Finally, plaintiffs argue that Warbasse's share of the settlement does not involve taxpayers' funds, and that, even if it did, the Court would not be justified in taking that factor into account (as it is alleged to have done) in setting attorneys' fees. While we question the assertion that the Warbasse portion has no impact on taxpayers' funds (and note that the Division's portion certainly does), the matter need not be decided for we merely stated in the November 15 Order that the involvement of public money merely prompted the Court "to scrutinize the attorneys' request with more care." However, the request was reduced not because of the public funds involved but because of the factors discussed in more detail above.

In summary, plaintiffs have not convinced this Court that its initial determination was wrong. Therefore, the motion to amend the November 15 Order will be denied.

SO ORDERED:

UNITED STATES DISTRICT JUDGE

1/ As we pointed out on p. 14 of that Order, Walter L. Stratton, lead counsel in that case, valued his time at $125 an hour. However, Mr. Stratton then had about 27 years of litigation experience, far more than any of plaintiffs' counsel here. In addition, the cost of overhead at his law firm, Donovan Leisure Newton & Irvine, most likely was considerably greater than the total cost to all three attorneys in this case. Moreover, on appeal the Second Circuit suggested that the award was excessive. Selzer v. Fleisher, 629 F.2d 809, 814 (2d Cir. 1980), cert. denied, 451 U.S. 970 (1981).

2/ These include cost-of-living increases, and the limited availability of qualified attorneys.

3/ In addition, the Act sets maximum fees, e.g., $1,000 per attorney for felony trials.

4/ See November 15, 1982 Memorandum & Order at 14-15 & n.11.

5/ It should be kept in mind that we have made a rather generous estimate of additional time which Mr. Bellman may be required to work on this matter, to wit: some 20 additional hours at $77 per hour. If little or no such additional work is required, Mr. Bellman's hourly fee in the matter will average about $83.50 an hour.

6/ Mr. Grosberg's affidavit reveals that he spent the bulk of his time involved in initial legal research, client interviews, discovery and factual investigation. Ms. Freeman divided her time roughly between court appearances, meetings and settlement discussions, according to her affidavit. We also note the possibility that some duplication of effort may occur when more than one attorney works on a case. To show that this did not happen, the three plaintiffs' counsel could have submitted more detailed time records. They did not, and the burden squarely rested on their shoulders to have done so. McCann v. Coughlin, Nos. 82-2213, 82-2220, slip op. at 1154-55 (2d Cir. Jan. 6, 1983).

Magistrate's Report, August 12, 1982

UNITED STATES GOVERNMENT

M E M O R A N D U M

August 12, 1982

A. Simon Chrein
United States Magistrate
Jones v. Amalgamated Warbasse Houses
Civil Action No. CV 80 344

Honorable Thomas C. Platt
United States District Judge

After several meetings with the parties, agreement has been reached disposing of this litigation. I enclose, with my recommendation that the Court grant its approval, a stipulation of settlement in this case.

/s/
A. SIMON CHREIN
United States Magistrate

ACS/ls

Office - Supreme Court, U.S.
FILED
MAR 16 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1336

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARY JONES, *et al.*,

Petitioners,

v.

AMALGAMATED WARBASSE HOUSES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT AMALGAMATED WARBASSE HOUSES, INC.

RONALD W. MEISTER
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New York, New York 10174
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Attorney for Respondent
Amalgamated Warbasse Houses, Inc.

Questions Presented

1. Where a bona fide class action settlement agreement provides only for injunctive relief, is a district court forbidden to review the amount of a fee award contained in that agreement?

2. When a district court finds, and the court of appeals unanimously affirms, that plaintiffs in a class action did not prevail on several of their claims; that plaintiffs' three separate law firms may have unnecessarily duplicated their efforts; that the tasks counsel performed were less complex than in other cases where comparable fees had been awarded; and that counsel had failed to submit contemporaneous time records, did the court abuse its discretion by awarding "only" an average of $75 per hour to each attorney for every hour claimed?

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RULE 28.1 STATEMENT

Amalgamated Warbasse Houses, Inc. has no parent company, subsidiaries or affiliates.

No. 83-1336

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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MARY JONES, et al.,

Petitioners,

v.

AMALGAMATED WARBASSE HOUSES, INC., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Amalgamated Warbasse Houses, Inc., a publicly-supported housing cooperative for limited-income residents, respectfully requests that this Court deny the petition for a writ of certiorari, in which plaintiffs' attorneys seek to increase their fee award by approximately $16,000.

Statement of the Case

Petitioners claim that the Court of Appeals for the Second Circuit (per Feinberg, Ch. J.), erred in its unanimous affirmance of the District Court's ruling reducing their attorneys' fees by $15,750.

The rather unusual history of this case illustrates the wisdom of according the trial court discretion to determine an appropriate fee for attorneys in class action settlements, and the absence of any issue warranting this Court's attention.

Plaintiffs commenced this action in February 1981 by a complaint that alleged, in essence, that the methods used by respondent Amalgamated Warbasse Houses, Inc. ("Warbasse") to fill its vacant cooperative apartments discriminated against minorities. From March 1981 until October 1982 (when the parties submitted a proposed settlement for the court's approval), no issues were litigated. There were no depositions, no discovery, no briefs,

no hearings, and, of course, no trial. This action was ultimately resolved simply through negotiation.

As is common, the parties differ on the extent of their relative success. It cannot be denied, however, that plaintiffs achieved "only partial or limited success" Hensley v. Eckerhart, ___ U.S. ___, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40, 52 (1983). Their complaint sought: (1) class certification; (2) a declaration that defendants' actions were discriminatory; (3) a permanent injunction against future discrimination; (4) a preliminary injunction against use of a waiting list created in 1981; (5) an injunction against use of a children's waiting list; (6) an injunction requiring the New York State Division of Housing and Community Renewal to oversee compliance with any remedial plan; (7) compensatory damages; (8) exemplary damages; and (9) an immediate trial. (A. 15-16).* Of

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* "A. ___" refers to the Joint Appendix filed

those nine items, plaintiffs obtained only item 1 (class certification) and, arguably, item 6 (Division supervision, which was already required by State regulation). In addition, they obtained modification of some apartment waiting lists, by interspersing minority applicants to fill eight per cent of available apartments over an eight-year period -- but the waiting lists they sought to abolish remain in use, and everyone on them before the action began remains on them.

In October 1982, the parties submitted to the District Court a proposed order and judgment to dispose of this case, which included a provision for attorneys' fees. While defendants submitted memoranda in support of the settlement, plaintiffs submitted nothing (A. 98).* When the District Court specifically

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* On the issue of attorneys' fees, Warbasse's brief stated, "Warbasse has disputed plaintiffs' entitlement to the payment of fees in this amount, [but] we recognize that continued litigation of this issue would make little economic sense." (A. 98). Plaintiffs, by an unsuccessful motion to amend the judgment, an unsuccessful appeal, and now a petition for certiorari, have since forced litigation of this $15,750 issue upon us.

asked counsel for some factual support for their fee application, only one of plaintiffs' three law firms complied, submitting a four-page affidavit. (A. 52-55). The only indication of the time counsel had spent on this case was the following two sentences:

> "As of the date of this affidavit, counsel have expended 321 hours in the prosecution of this litigation. Of these total hours, 241 were spent by Richard F. Bellman, 60 by Lawrence Grosberg and 20 by Karen Freeman." (A. 53).

Counsel supplied no contemporaneous time records, and made no attempt to describe the amount of time they had spent on each task.

Based on that submission, the District Court, recognizing its independent responsibility to see that a fee award is reasonable, reduced counsels' request by slightly more than one-third. (36a-43a).*

Only after the District Court's decision did plaintiffs submit -- on a motion to amend the judgment -- anything even resembling the

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* "___a" refers to the appendix to petitioners' brief.

kind of support required to justify a request for fees. Having thus led the District Court into what they now claim was error, plaintiffs' three firms then submitted four additional affidavits. (A. 75-96). Everything in their belated submission could have been provided to the court earlier, but plaintiffs chose not to provide it. Even then, two of plaintiffs' firms still submitted nothing in support of their claim for $10,320 for eighty hours of work, except to state their experience as lawyers. (A. 91-96, 99). Only after defendants' response pointed out the inadequacy of those submissions (A. 99) did plaintiffs' attorneys prepare three more affidavits, describing in summary fashion what they had done in this case (A. 106-13) -- thus bringing to a total of eight the affidavits they submitted to show that their work had been done without waste or duplication.

After reviewing these additional affidavits, the District Court awarded no further fees. Its opinion specifically noted

that plaintiffs did not "win"; that the risk and difficulty of the litigation were not unusually great; that counsels' time records had failed to demonstrate the absence of duplication; and that, in light of all the circumstances, it had awarded a reasonable average fee for all plaintiffs' attorneys' work, from the most routine to the most challenging. (51a-58a, 61a,n.6).

In an opinion noting the care taken by the District Court, 721 F.2d 881, 885 (2d Cir. 1983), (15a), the Court of Appeals (per Feinberg, Ch.J., and Lumbard and Newman, C.JJ.) disposed of plaintiffs' arguments without difficulty and held that the District Court had properly exercised its discretion.

Summary of Argument

Nothing in the idiosyncratic facts of this case or the unexceptionable principles of law unanimously applied below warrants the time or attention of this Court. Reduced to its essence, plaintiffs' attorneys' grievance is

simply that the courts below awarded them fees averaging "only" $75 per hour* for every hour claimed, rather than the nearly $130 per hour they sought. The total amount at issue is less than $16,000. Nor were any important legal principles involved, except the familiar one that a trial court may -- indeed must -- review all aspects of a proposed class settlement, including any fee agreement.

Under the unique facts of this case, plaintiffs' attorneys cannot claim they were short-changed by being awarded an average of "only" $75 per hour. Plaintiffs obtained only a fraction of the relief they sought. This case involved no depositions, no hearing, no trial, and (except for this continued

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* As the District Court recognized, counsels' estimate of the post-judgment labor required in this case was a generous one. If counsel were required to expend little or no additional effort on the case, the sum awarded to plaintiff's lead counsel would amount to an average hourly rate of $83.50. (60a,n.5).

litigation of the fee issue) no appeals. Plaintiffs were represented throughout by three separate attorneys, two of whom never spoke a word in court, but all of whom sought and were awarded substantial fees for every hour of work performed -- whether for proofreading, conferring or sitting mute in the courtroom gallery, and whether the work was suitable for partners, associates, paralegals or secretaries. Under such circumstances, an award of $26,000 in fees is scarcely an injustice calling out for correction by this Court.

Moreover, counsels' failure to provide contemporaneous time records provides an independent reason why certiorari should be denied. This Court restated just last term:

> [W]e would not view with sympathy any claim that the district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims.

Hensley v. Eckerhart, __ U.S. __, 103 S.Ct. 1933, 1941 n.12, 76 L.Ed.2d 40, 53 n.12 (1983). That statement precisely describes this case. Plaintiffs' counsel have felt it appropriate to burden this Court, the Court of Appeals, and the District Court with an application for $15,750 in additional fees. In an area where judicial discretion is broad, see Hensley v. Eckerhart, supra; Gagne v. Maher, 448 U.S. 122 (1980), aff'g 594 F.2d 336, 344 (2d Cir. 1979), and where Chief Judge Feinberg of the Court of Appeals wrote that "the district court carefully considered the many factors relevant to a decision whether to accept or reject a fee settlement and set out its reasons for rejecting the fees agreed upon and for making a reduction," 721 F.2d at 885, (15a), there is no ground for issuing the writ.

None of the arguments raised by petitioners warrants a grant of certiorari. There is no conflict in the authority for the settled rule that courts may review all aspects

of a class action settlement, including a fee award. There is no danger that the court's exercise of its discretion in this case will encourage litigation or discourage litigators; and there is no basis for any contention that the District Court applied improper considerations or standards below. There is emphatically no Blum v. Stenson issue presented in this case, since the court below made clear that its award was based solely on the quality of the work done and the degree of petitioners' success.

For all these reasons, the writ should be denied.

REASONS FOR DENYING THE WRIT

I. The District Court Had a Duty To Review The Award of Attorneys' Fees

The Court of Appeals squarely addressed, and rejected, petitioners' argument that a District Court is forbidden to review the amount of a fee award contained in an arms-length negotiated class action settlement agreement.* 721 F.2d at 884, (10a). Neither petitioners' brief below nor their petition here could cite a single case to the contrary.

The law, amply cited by the Court of Appeals, squarely supports the District Court's power to review such fee agreements. E.g., Malchman v. Davis, 706 F.2d 426, 435-36 (2d Cir. 1983); Piambino v. Bailey, 610 F.2d 1306,

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* Though petitioners disclaim arguing that the court should be a "rubber stamp," they contend that, at least where the settlement is "not collusive" and defendants (rather than the class) have to foot the bill, "a district court should approve the fees in the amount agreed," (Petitioners' brief at 19) apparently as a matter of law. This is a "rubber stamp" in all but name.

1328 (5th Cir.), cert. denied, 448 U.S. 1011 (1980); Foster v. Boise-Cascade, Inc., 577 F.2d 335, 336 (5th Cir. 1978), aff'g 420 F.Supp. 674 (S.D.Tex. 1976); Levin v. Mississippi River Corp., 377 F.Supp. 926, 930-31 (S.D.N.Y.), aff'd, 508 F.2d 836 (2d Cir.1974), cert. denied, 429 U.S. 833 (1976); 3B J.Moore, Federal Practice, ¶23.91 at p. 142 (1983-84 Cum. Supp.)

This principle is not in dispute and requires no further restatement by this Court. Just last term this Court stressed the District Court's discretion to determine the reasonableness of fee awards:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

Hensley v. Eckerhart, supra, 103 S.Ct. at 1941, 76 L.Ed.2d at 53. See also, Wheatley v. Ford, 679 F.2d 1037, 1040 (2d Cir. 1982); Gagne v.

Maher, 594 F.2d 336, 344 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980).

As the Court of Appeals emphasized below, "The [District Court's] perspective and obligations are different from those of the parties. . . .

> The court has a special responsibility to supervise the matter of attorneys' fees in class actions and in any litigation involving a fee-shifting statute like section 1988. Even in a case such as this, where any decrease in the amount of the fees will not inure to the benefit of the plaintiff class, which received only injunctive relief, the court's downward revision of a fee settlement unacceptable to the court will promote confidence in the integrity of the judicial process and is a proper exercise of authority over officers of the court in litigation pending before the court.

721 F.2d at 884-85, (11a, 14a-15a).

Not only is it not error for a court to review the amount of fees awarded, it is error not to do so, even when the parties submit a proposed agreement. As Judge Weinfeld has stated,

> [T]o accept as conclusive the parties' agreement as to fees in a class or derivative action would mean the surrender

> of the court's duty and its discretion. The agreement, while it may have some relevance, does not relieve the court of its duty to make an independent appraisal, to "avoid awarding 'windfall fees' and . . . likewise avoid every appearance of having done so," and to award only such fees that are fair, "with an eye to moderation" based upon the applicable standards.

Levin v. Mississippi River Corp., 377 F.Supp. 926, 931 (S.D.N.Y.), aff'd, 508 F.2d 836 (2d Cir. 1974), cert. denied, 429 U.S. 833 (1976), quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 469-70 (2d Cir. 1974).

This principle is not in dispute, except by petitioners. A court must examine every aspect of a class action settlement, even if the parties have negotiated at arms' length and in good faith. Malchman v. Davis, 706 F.2d 426, 435-36 (2d Cir. 1983); Piambino v. Bailey, 610 F.2d 1306, 1328 (5th Cir.), cert. denied, 448 U.S. 1011 (1980). As every Court that has considered the matter has concluded, the parties may not and can not relieve the District Court of its duty to review even a negotiated fee award.

II. There Is No Danger That The Decision Below Will Encourage Litigation Or Discourage Attorneys From Accepting Cases

Petitioners assert that the traditional power of courts to review class action fee agreements -- and adjust them if they are unreasonable under the facts of a particular case -- will encourage litigation and discourage litigators. We may justifiably expect, however, that the plaintiffs' bar will not be deterred from taking cases by the fear that the courts will not award them unreasonable fees.

Permitting courts to review settlement agreements, and thus necessarily permitting them to reject or modify some of them, is nothing new to the law. Courts have routinely exercised their duty to review, and their discretion to adjust, the fees awarded in class action settlements, without the dire effects petitioners fear.

Petitioners argue that, unless the courts are stripped of this traditional power to review fee settlements, counsel will have no incentive to agree on fees. The same might be said regarding the review of any term of a settlement agreement. But petitioners' veiled threat to litigate all fee disputes, in addition to disregarding their obligations as officers of the court, overlooks the very substantial benefits they obtain by settling: reducing litigation costs, hastening settlements, and, not least, causing defendants to refrain from challenging the agreed award when it is presented to the reviewing court. Moreover, like any other aspect of a settlement, a fee agreement is afforded a presumption of regularity. If the agreed fee is at all reasonable in light of the facts of the particular case -- as it here was not -- there is every reason to assume that the court

will accept it.* These benefits will remain, and will adequately encourage settlement, regardless of whether the trial court retains its right to review the settlement agreement.

Finally, of course, allowing the trial court to make sure that fees are "reasonable" should not fatally discourage counsel. The courts' discretion, and the presumption of regularity afforded settlement agreements will adequately protect those attorneys from hardship. They have no right to expect their fees to be "unreasonable".

III. Neither The Decision Below Nor The Record Supports Any Claim That The Court Reduced The Fees Sought Because This Is A Civil Rights Case

Seizing on the pendency of Blum v. Stenson, S.Ct. Dkt. No. 81-1374 in this Court,

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* Indeed, the Second Circuit, in the very opinion petitioners now assail, reaffirmed that such an agreement should be given great weight by the reviewing court, 721 F.2d at 885, (13a-14a).

petitioners raise for the first time the argument that the District Court reduced the fees here because this is a civil rights case. They made no such argument below, nor did they even cite Stenson to the Court of Appeals.

Petitioners' effort to shoehorn a Stenson issue into this case must fail, because nothing in this case raises any such issue.

The important issues in Stenson are straightforward: whether fees awarded to non-profit firms should be reduced because of their relatively low overhead; and whether a bonus for the "contingent" nature of a claim is proper. Those issues are not present here.

Here the District Court made clear its reasons for reducing the fee sought: lack of success on several claims; inadequate time records; possible duplication of effort; and work whose complexity and difficulty were far less than in cases where comparable fees had been awarded. There is no suggestion in the opinions below that counsels' fee was reduced

because this was a civil rights case, and the District Court specifically refuted petitioners' claim that it had reduced the fee because public funds were involved. (58a). The Court of Appeals, like the District Court, was well aware that "rates awarded to civil rights counsel should ordinarily be on par with market rates for private attorneys engaged in other complex federal litigation," 721 F.2d at 885, (17a). It held that the District Court properly examined the hourly rates awarded in comparable recent cases.

Thus, nothing in either the District Court's "carefully considered" opinion, 721 F.2d at 885, (15a), or the Court of Appeals' affirmance of it, raises the second question purportedly presented by the petition.

IV. The Courts Below Applied The Proper Standards In Determining Plaintiffs' Attorneys' Fee

The argument of would-be amici* that the courts below applied incorrect standards in reviewing the fee sought is without substance.

To be sure, some courts have awarded very high hourly rates in some civil rights cases, as in other cases, where the nature of the work actually performed -- complicated motion practice, discovery, trial work, etc. -- justified the award. Here, those factors are lacking. Moreover, as the courts below noted (17a, 51a-53a) an average fee of $75.00** per hour (for all hours by every attorney) is well within the range of fees awarded in similar cases in New York. E.g., Kow v. New York City

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* Respondent Warbasse denied a Rule 36 request for leave to file an amicus brief, for the reasons set forth in correspondence annexed to this brief.

** Or $83.50, see footnote, p. 8, supra.

Housing Authority, 539 F.Supp. 708, 710 (S.D.N.Y. 1982) (awarding fees of $75 per hour); Cleary v. Blum, 507 F.Supp. 514, 518 (S.D.N.Y. 1981) (awarding $75 per hour to attorney with 11 years experience, less to others); Thomas v. Board of Education, 505 F.Supp. 102, 104-05 (N.D.N.Y. 1981) (awarding fees of $50 per hour to ACLU specialist, less to another); Sharrock v. Harris 489 F.Supp. 913, 916 (S.D.N.Y. 1980) (awarding $75 per hour to attorneys with 16 and 12 years experience, less to another).

Nor is it correct that the District Court reduced the fees sought because of the involvement of taxpayer funds. The District Court carefully explained (58a), and the Court of Appeals found no reason to doubt, that this fact "was not a reason for the reduction." (16a).

Finally, despite amici's objection to the lower courts' considering that petitioners did not completely "win" below, this Court held

only last term in Hensley v. Eckerhart that the degree of a party's success must be taken into account in setting fees:

> If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation on the whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims are interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

103 S.Ct. at 1941, 76 L.Ed.2d at 52.

V. Petitioners' Failure To Maintain Adequate Time Records Provides An Independent Ground For Affirmance

A grant of certiorari would be particularly inappropriate in this case, where there exists an independent ground for affirmance: plaintiffs' attorneys' failure to keep or provide adequate time records.

This Court and the Court of Appeals for the Second Circuit have made amply clear to

attorneys seeking fee awards that their applications must be supported by adequate records of each attorney seeking fees. Hensley v. Eckerhart, ___ U.S. ___, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40, 50 (1983), McCann v. Coughlin, 698 F.2d 112, 131 (2d Cir. 1983) and cases cited therein.

Petitioners here never provided any contemporaneous time records. Even after the District Court requested time information, counsel at first supplied no information on how their time had been spent. Only on their motion to amend the judgment, after the Court reduced the fees they sought, did they even supply post facto summary breakdowns of their time into a few general categories: "initial work," "settlement," "liaison," etc. (A. 89, 110-11, 112-113). While petitioners' three law firms claim all their work was necessary and non-duplicative, they failed to provide the District Court with information to support that claim. (61a).

Petitioners' failure to supply detailed time records by itself precludes any complaint than the court awarded them less than they deserved. Hensley v. Eckerhart, ___ U.S. ___, 103 S.Ct. 1933, 1941 n.12, 76 L.Ed.2d 40, 53 n.12 (1983), quoting Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978). "Where the documentation of hours is inadequate the district court may reduce the award accordingly." Hensley, supra, 103 S.Ct. at 1939, 76 L.Ed.2d at 50.*

Conclusion

Because this case rests on unique facts; because the District Court's discretion to

---

* No purpose would be served by remanding this application for further consideration or findings of fact. Petitioners' attorneys have had several opportunities to present more detailed records, and failed to do so. Moreover, in a case like this, where the total amount in controversy is less than $16,000, a remand for further proceedings would disproportionately burden the parties and the courts.

review fee awards is broad and undisputed; because the decision below is not in conflict with any other decision; because this Court last term held it would not view claims like petitioners' with sympathy; because the case has been rightly decided; because there are independent grounds for affirmance; because the argument that the court below reduced the fee award because this is a civil rights case is a sham; because this case raises no issue that is not covered by this Court's prior decisions; because the amount at issue is very small; and because further litigation of this issue would unfairly burden the parties and the courts, the petition should be denied.

Respectfully submitted,

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405 Lexington Avenue
New York, New York 10174
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John M. Devlin
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Of Counsel

March 14, 1984

APPENDIX

LDF Legal Defense Fund

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street, New York, N.Y. 10013• (212) 219-1900

February 15, 1984

Ronald W. Meister, Esq.
Kornstein Meister & Veisz
405 Lexington Avenue
New York, N.Y. 10174

Re: Jones v. Amalgamated Warbasse Houses, Inc.

Dear Mr. Meister:

This letter is to request your consent, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, to the filing of an amicus curiae brief by the NAACP Legal Defense and Educational Fund, Inc., and the American Civil Liberties Union in support of the petition for a writ of certiorari in the above case.

Thank you very much.

Very truly yours,

Charles S. Ralston

Charles Stephen Ralston

CSR/gj

Contributions are deductible for U.S. income tax purposes

The NAACP LEGAL DEFENSE & EDUCATIONAL FUND is not part of the National Association for the Advancement of Colored People although it was founded by it and shares its commitment to equal rights. LDF has had for over 25 years a separate Board, program, staff, office and budget.

KORNSTEIN MEISTER & VEISZ
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February 21, 1984

Charles Stephen Ralston, Esq.
NAACP Legal Defense and Educational
Fund, Inc.
99 Hudson Street
New York, New York 10013

Jones v. Amalgamated Warbasse Houses, Inc.

Dear Mr. Ralston:

While I consider it difficult to deny any request of the Legal Defense Fund, whom I have represented in several pro bono matters, I do not consent to the request made in your February 15 letter regarding Jones v. Warbasse. As Chief Judge Feinberg's opinion makes clear, the decision plaintiffs seek to reverse was well within the District Court's discretion, in an area where the trial court's discretion is very broad. All the factors considered by the District Court were properly considered, including the nature of the services provided and plaintiffs' relative lack of success. Moreover, plaintiffs' attempt to manufacture an issue under Blum v. Stenson makes no sense, since neither the District Court nor the Court of Appeals made the slightest suggestion that the fees here were reduced because this was a civil rights case.

While one might sympathize with the Fund's desire to obtain higher fees for counsel in civil rights cases, this is certainly not the case to raise that issue -- for several reasons, including the idiosyncratic facts, the small amount involved and counsel's inadequate time records. See Hensley v. Eckerhart, - U.S. - , 76 L.Ed.2d 40 (1983).

Sincerely,

Ronald W. Meister

Ronald W. Meister

RWM/r

cc: Melvyn R. Leventhal, Esq.
James M. Nabrit III, Esq.

No. 83-1336

Office - Supreme Court, U.S.
FILED
MAR 16 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

MARY JONES, et al.,

Petitioners,

v.

AMALGAMATED WARBASSE HOUSES, INC., et al.,

Respondents.

RESPONDENT STATE OF NEW YORK'S BRIEF IN OPPOSITION TO CERTIORARI

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Questions Presented

1. Whether the Court of Appeals was correct in holding—under Rule 23(e) of the Federal Rules of Civil Procedure and under The Civil Rights Attorney's Fee Awards Act (42 U.S.C. § 1988)—that the amount of attorneys' fees agreed to by the parties in a proposed settlement of a class action must be independently reviewed by a district court for "reasonableness."

2. Whether the district court was correct in holding that in calculating a reasonable attorney's fee award under 42 U.S.C. § 1988, it may consider the nature of the work performed and the results achieved.

The following question, while not raised in the courts below, was briefed by petitioners and accordingly is addressed by respondent:

3. Given that waivers of sovereign immunity are strictly construed in favor of the sovereign and in light of the policy underpinnings and legislative history of 42 U.S.C. § 1988, whether fee awards under 42 U.S.C. § 1988 must be based on marketplace antitrust rates.

Parties in Court Below

Mary Jones, Beverly Harris, Ernest Simmons, Mildred Malloy, *petitioners*. Amalgamated Warbasse Houses, Inc., New York State Division of Housing and Community Renewal, Richard Berman, *respondents*.

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Statement of the Case

Respondent Amalgamated Warbasse Houses, Inc. (Warbasse) is a state financed apartment house complex consisting of 2,600 units. On December 16, 1980 petitioners filed a class action complaint against Warbasse alleging that vacant apartments at the complex were filled through racially discriminatory policies and practices that resulted in 99% of the apartments being occupied by whites. Also named as a defendant was the New York State Division of Housing and Community Renewal which, it was alleged, regulates tenant admission practices at all state financed housing projects.

On August 9, 1982 the parties submitted to the district court a proposed settlement agreement for review and approval pursuant to Fed. R. Civ. P. 23(e). It provided that Warbasse would recruit minorities and create a minority waiting list. Approximately one out of every four vacant apartments was to be filled by persons on that minority list until 215 apartments were occupied by persons from that list. (Petition, pp. 22a-23a). (It was projected that eight years would be required to realize the goal of 215 minority occupied apartments.) The proposed settlement also provided for an award of attorney's fees of $129 an hour to each of plaintiffs' three attorneys. The total award of $41,750 was to be paid 60% by Warbasse and 40% by the State of New York.

On November 15, 1982 the district court approved the settlement of merits but modified the agreement on attorneys' fees. The court found the hourly rate of $129 ex-

cessive, beyond the "range of reasonableness" (Petition, p. 51a), for two reasons. First, the time expended was largely on tasks preliminary to litigation and in the discussion of settlement terms; no time was expended in depositions, or in the briefing of numerous legal points or in the preparation and conducting of a protracted jury trial. (Petition, p. 57a). Secondly, the court held that the terms of the settlement represented a compromise —plaintiffs did not "win"—and therefore that the "results achieved" could not support the hourly rate. (Petition, p. 56a). The court approved $75 as the appropriate average hourly rate for all time expended "from the most routine to the most challenging." (Petition, p. 52a). The total award was reduced to $26,000, with Warbasse ordered to pay $15,880 and the taxpayers of New York $10,120. (Petition, p. 7a).

On February 18, 1983 the district court by supplemental memorandum denied petitioners' motion for reconsideration. Nevertheless, it refined the $75 an hour rate so that lead counsel received $77 an hour, the second attorney, $70 and the third, $60. (Petition, pp. 54a-55a).

In their appeal to the Second Circuit petitioners argued for the first time that a district court must rubber-stamp an attorneys' fees settlement absent evidence of irregularities. On November 14, 1983 the Court of Appeals affirmed. It held that settlements must of course be encouraged. "An arms' length negotiated agreement among the parties weighs strongly in favor of approval." (Petition, p. 10a). Where, however, the parties and class members are unlikely to complain and the district court has "good rea-

son" to find the award excessive, the strong presumption in favor of the settlement agreement can be overcome. The district court must have the power to adjust the fee downward "in class actions and in any litigation involving fee shifting statutes like § 1988," out of "concern that the public will perceive the award as excessive," and to "promote confidence in the integrity of the judicial process." The appeals court also found such district court review "a proper exercise of authority over officers of the court in litigation pending before the court." (Petition, pp. 14a-15a).

Summary of Argument

I

The courts must independently review a proposed settlement on attorneys' fees in class action and in fee-shifting cases to safeguard the integrity of the bar, as an aspect of its duty to supervise attorneys it approves as counsel for a class, and to allay the public's perception that attorneys are the only winners in these cases. Independent judicial review of proposed fee award settlements is also necessary because arms' length and good faith settlement negotiations will often not protect against excessive awards. Moreover, an attorney may accept inadequate class relief to settle a case to guarantee himself a fee award. The district court has a duty to protect against this potential conflict by independently establishing that the fee award is in line with the results achieved.

Petitioners' claim that such judicial review will discourage settlement agreements is baseless. Proposed set-

tlements have long been submitted to district courts for critical review under Rule 23(e), Federal Rules of Civil Procedure. This has not had any discernible "chilling effect" on the development and submission of proposed settlements.

II

The issues raised in *Blum* v. *Stenson* are not raised here. The holding of the district court, that hourly rates must reflect the nature of the work performed, merely protects a defendant, for example, from being billed by plaintiffs' senior attorney on the basis of his customary hourly rate for time he expends at a copying machine. The district court's holding is therefore but a routine application of this Court's holding in *Hensley* that "billing judgment" principles must guide the court to protect defendants from excessive awards.

Petitioners' assertion that § 1988 fee awards must equal the highest fees available in the marketplace is unsupportable. "Moderation" is the guiding principle controlling awards under all fee-shifting statutes. In addition, the legislative history and the policy considerations which undergird § 1988 do not permit fee awards equal to those obtained by antitrust lawyers in the marketplace.

ARGUMENT

I

The appeals court correctly held that a proposed settlement agreement relating to fees in a class action or fee-shifting case must be independently reviewed by the district court to promote confidence in the integrity of the judicial process and to protect against excessive fee awards.

The public continues to view the bench and bar with cynicism because class action and fee-shifting litigation too often primarily benefits counsel for the plaintiff class. To allay these suspicions fee awards must be subject to more than adversarial testing. *Gabriele* v. *Southworth*, 712 F. 2d 1505, 1507 (1st Cir. 1983). The surest path to public ridicule of the bar and bench is a procedure under which the court carefully reviews all aspects of a settlement agreement *except* provisions relating to attorney's fees. That is precisely the approach petitioners urge.

Independent judicial review of a fee agreement is also an aspect of judicial supervision of officers of the court. (Petition, p. 15a). In a class action, an attorney's status as the class representative results from a judicial determination. If petitioners' counsel were only representing named plaintiffs the results obtained would not justify a fee award of $26,000. The only relief obtained for the named plaintiffs was the right—never exercised by any of them—to appear at the top of the newly created minority waiting list. The judiciary's power to create a substantial business opportunity for an attorney, as the class's repre-

sentative, entails a duty in the judiciary to supervise carefully the substantial reward reaped by that attorney. Indeed, an attorney has a duty to support rather than challenge such supervision.

Arms' length negotiations will not assure the vindication of these concerns nor will they always protect against excessive awards. As the appeals court observed, there are settlements in which "no one is likely to complain." (Petition, p. 12a). Plaintiffs' counsel may, for example, have the benefit of economic leverage that impels a defendant to settle. Here, Warbasse and the State were forced to conclude that the cost of settlement was lower than the cost of further litigation which would have entailed additional fees not only for time expended by their own counsel but for time expended by plaintiffs' counsel.

District court review of the settlement also protects against a conflict of interest between the class and its counsel. Plaintiff's attorney may accept insufficient relief for the class because he knows that settlement will result in a substantial fee award. Defendant obviously will not protest. The negotiations will appear to proceed in good faith. The court, by independently establishing that the fee award is in line with the "results achieved," provides some measure of protection against this potential conflict.[1] *See,* discussion and authorities cited in *Foster* v. *Boise-Cascade, Inc.,* 420 F. Supp. 674 (S.D. Tex. 1976), *aff'd on basis of district court opinion,* 577 F. 2d 335 (5th Cir. 1978).

1. A procedure that requires a settlement of the merits before attorneys' fees are discussed or sought is of limited value. Under that procedure, the attorney knows full well that if and when he settles the merits a substantial fee award is around the corner. Only the exact amount is unknown.

Petitioners' assertion that settlements will be discouraged unless this Court directs lower courts to rubber-stamp privately negotiated agreements, is sophistry. The plaintiffs' bar has long known that proposed settlements may be rejected by the courts under Fed. R. Civ. P. Rule 23(e). This has not had any discernible "chilling effect" on the submission of settlement agreements. Moreover, the occasional rejection of a proposed settlement is a small and necessary price for the vindication of Rule 23(e) and related concerns.

Petitioners correctly note that *Hensley* urges and contemplates settlement of fee disputes.[2] But they are incorrect in suggesting that under *Hensley*, settlement is so important that all else must be sacrificed. Under petitioners' reading of this Court's holding a settlement must be approved even if the fee agreed upon is grossly disproportionate to the results achieved. Yet *Hensley* teaches precisely the opposite.

The Court of Appeals correctly decided the issue.[3] No authorities support a contrary holding and certiorari should be denied.

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2. Settlements will be more likely when the parties learn the parameters of permissible fee awards through this Court's decision in *Blum* v. *Stenson*, S. Ct. Dkt. No. 81-1374.

3. The State of New York, to honor its commitments under the settlement, aligned itself with plaintiffs on the facts in the Court of Appeals. Respondent is nevertheless of the clear view that this case should not be reviewed in this Court and that the principles relied upon by the Court of Appeals and the district court are correct.

II

A. The issues raised in *Blum* v. *Stenson* are not raised in this case.

Petitioners assert that this case raises issues "similar" to those before the Court in *Blum* v. *Stenson*. It does not. *Blum* raises the following three issues, none of which is raised here:

1. Section 1988 explicitly limits fee awards to a "prevailing party." A fee award that is adjusted upward because payment is contingent on success indirectly compensates an attorney for cases he has lost. The issue then is whether a district court that adjusted a fee upward because of its "contingent nature," circumvented Congress's explicit directive that awards be limited to meritorious cases—those in which a party prevails; or whether the district court forced the State of New York to pay fees indirectly that it may not be required to pay directly. Also under review is the routinely advanced claim that the "novelty and complexity" of a case justifies a "bonus" award.

2. Whether hourly rates awarded to non-profit organizations must be substantially lower than those awarded a commercial firm because of the non-profit firm's lower overhead and the absence of any right to a distribution of profits, or any need for a profit component in the award to induce such organizations to undertake civil rights cases. Forced to its limits, the issue may be stated as whether a fee awarded by a court, even to a private practitioner, should reflect the attorney's reasonable overhead; *e.g.*, whether a plaintiff's attorney practicing out of his home

with a telephone answering machine, may demand a fee from the State of New York equal to the fee freely negotiated by a large commercial firm with its private clients.

3. Whether an attorney's failure to maintain detailed contemporaneous time records, especially where two or more attorneys claim hours for the same activity, requires a downward adjustment of the fee award.

B. The issue raised below was correctly decided under *Hensley* v. *Eckerhart*.

The district court below held that fee awards may vary based on the "complexity and difficulty of the work" performed. (Petition, pp. 42a, 57a).[4] It held that time expended on tasks preliminary to litigation and in the discussion of settlement terms should be compensated at rates lower than those granted for a protracted jury trial attended by complex pretrial discovery and legal issues. (Petition, pp. 40a-42a, 57a). The district court did not attempt to assign an hourly rate to each activity. Rather it estimated that $75 an hour was an appropriate average hourly rate for all work "from the most routine to the most challenging." (Petition, p. 52a).[5]

4. The district court also reduced the hourly rate from $129 to $75 based on the results achieved and because detailed contemporaneous time records were not maintained. (Petition, pp. 42a, 57a, 61a). These holdings echo those of *Hensley* v. *Eckerhart*, —— U.S. ——, 103 S. Ct. 1933 (1983).

5. Some district courts are quite comfortable assigning different hourly rates to each task performed. *See*, for example, *Foster* v. *Boise-Cascade*, 420 F. Supp. 674, 690-695 (S.D. Tex. 1976), *aff'd* 577 F.2d 335 (5th Cir. 1978); *Norwood* v. *Harrison*, 410 F. Supp. 133, 142, n.10 (N.D. Miss. 1976).

The rule adopted by the district court is but a correct application of this Court's *unanimous* holding that "billing judgment" is a critical guidepost for both court imposed and privately negotiated attorney's fees. *Hensley* v. *Eckerhart*, —— U.S. ——, 103 S. Ct. 1933, 1939-40 (1983) (Powell, J.); p. 1947 (Brennan, J. concurring). To allow fees without regard to the nature of the work performed would force defendants to pay fees at the whim of plaintiffs' counsel. It would allow a senior partner in a firm representing plaintiffs to bill the State his customary hourly rate if he decides to expend his time researching whether a particular interrogatory is impermissibly burdensome or if he decides to expend his time at a copying machine.

The principle adopted by the district court is also supported by *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974), the only case cited in both Senate and House Committee Reports for § 1988. In *Johnson* the district court was directed to "scrutinize" the fee application to assure the "proper utilization of time" and was authorized to base a fee award on the "type of work performed." *Id.* at 717. See *also, Northcross* v. *Board of Education of Memphis City Schools*, 611 F. 2d 624, 637 (6th Cir. 1979) ("necessary services . . . which could reasonably have been performed by less expensive personnel may be compensated at a lower rate than an attorney's normal billing rate"); *Ursic* v. *Bethlehem Mines*, 719 F. 2d 670, 677 (3d Cir. 1983) ("A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn"); *City of Detroit* v. *Grinnell Corp.*, 560 F. 2d 1093, 1099-1100 (2d Cir. 1977) (time expended in the administration of a consent judgment commands a lower

hourly rate); *Lindy Bros. Bldrs., Inc. of Phila.* v. *American R & S San. Corp.*, 487 F. 2d 161, 167 (3d Cir. 1973) ("reasonable rate of compensation differs for different activities").

The district court decided the issue in accordance with this Court's holding in *Hensley* and certiorari should be denied.

C. The legislative history of § 1988 does not support an award of fees equal to those obtained by antitrust lawyers in the marketplace.

Petitioners argue that the "underlying issue" is whether fee awards in civil rights or § 1988 cases will be at rates attorneys "command in similar types of litigation." (Petition, p. 20). As demonstrated above, pp. 9-10, petitioners misstate the issue presented. In any event, "moderation" is the cornerstone of all court awards of "reasonable" attorney's fees, including those in antitrust and other fee-shifting settings. *City of Detroit* v. *Grinnell, Corp.*, 495 F. 2d 448, 470 (2d Cir. 1974); *Ursic* v. *Bethlehem Mines*, 719 F. 2d 670, 678 (3d Cir. 1983) (in cases awarding attorney's fees under ERISA, lawyers must exercise "restraint," the courts must insist on "moderation," and "excesses will not be countenanced").

Whether a given fee is excessive will also depend on the legislative history and policy considerations underlying the relevant fee-shifting statute. Although § 1988, ERISA, Title VII of the Civil Rights Act of 1964 and the Clayton Act all provide that fee awards must be "reasonable," the amount of the award may vary based on both the statute and the identity of the prevailing party. Thus, fees

awarded under § 1988 must be "moderate" because of Eleventh Amendment concerns. *Finney* v. *Hutto*, 437 U.S. 678, 692, n.18 (1978). The standards controlling fee awards under ERISA are different from those controlling under other statutes. *Ursic* v. *Bethlehem Mines*, 719 F. 2d 670 673 (3d Cir. 1983) (under ERISA, the court must consider defendant's culpability and ability to pay, the deterrent effect of the award, the benefit conferred on the class, and the relative merits of the parties' positions). Fees awarded against a losing plaintiff in an employment discrimination case may be based on his ability to pay. *Faraci* v. *Hickey-Freeman Co., Inc.*, 607 F. 2d 1025, 1028 (2d Cir. 1979). A fee award in an antitrust case serves as a "penalty" for an intentional wrong. *Illinois* v. *Sangamo Construction Co.*, 657 F. 2d 855, 859-60 (7th Cir. 1981). Although fees for time expended seeking fees are clearly recoverable in all § 1988 cases, such fees are not awarded in antitrust cases resolved through a consent judgment. *Compare, City of Detroit* v. *Grinnell Corp.*, 560 F. 2d 1093, 1100, 1102 (2d Cir. 1977), *with Northcross* v. *Board of Education of Memphis City Schools*, 611 F. 2d 624, 637 (6th Cir. 1979); *cf. Maher* v. *Gagne*, 448 U.S. 122, 129 (1980).

An important policy consideration in § 1988 cases is that "waivers of [sovereign] immunity are strictly construed in favor of the sovereign." *Ruckelshaus* v. *Sierra Club*, —— U.S. ——, 103 S. Ct. 3274, 3277 (1983). In *Ruckelshaus*, the Court held that a statute providing for fee awards against the United States and private parties in "appropriate" cases could not be read to authorize a fee award to a losing plaintiff; more explicit language was required to abrogate the government's immunity. Plaintiffs must advance com-

pelling evidence that Congress intended to adopt the standard they urge. Ideally, the expression of Congressional intent must appear in "explicit statutory language." *Finney* v. *Hutto*, 437 U.S. 678, 706 (1978) (Powell, J. dissenting). All ambiguities must be resolved in favor of the State.

In the face of this demanding standard, petitioners are unable to rely on the plain language of the statute. Rather they are compelled to go over the legislative history with a fine-toothed comb searching for clues that support their position. They argue that antitrust rates should apply in § 1988 cases based on one-half of a sentence appearing in the relevant paragraph of the Senate Committee Report. (Petition, pp. 20-21, n.7). This meager authority is predictably inconclusive: petitioners distort the import of the Committee Report by ignoring the second half of the sentence, the very next sentence and the relevant paragraph as a whole. They cite only that part of the following paragraph in the Senate Committee Report quoted in italics below:

> *It is intended that the amount of the fees awarded under [1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases* and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson* v. *Georgia Highway Express*, . . . are correctly applied in such cases as . . . [three cases listed]. These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. (Emphasis added.)

The first half of the cited sentence when read in conjunction with the second half of the sentence merely bars a distinction between antitrust and civil rights cases based upon the difference between pecuniary and nonpecuniary interests. But that does not mean that the standards controlling generally should be the same. Moreover, in the very next sentence, the "appropriate standards" for § 1988 cases are said to be those of *Johnson*, a civil rights case that explicitly approved fee awards as low as those authorized by the Criminal Act and minimum fee schedules. 488 F. 2d at 718. Thus petitioners' oft-cited sentence fragment is insufficient to establish a clear Congressional intent to approve fee awards against a state treasury equal to marketplace antitrust rates.[6]

6. Petitioners' sentence fragment, when read in isolation, requires this Court to hold that *all* § 1988 cases are "complex," an absurd result given that many simple cases are subject to § 1988 fee awards.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 83-1336

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARY JONES et al.,

Petitioners,

vs.

AMALGAMATED WARBASSE HOUSES, INC., et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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This reply brief is filed in light of this Court's recent ruling in Blum v. Stenson, ___ U.S. ___, No. 81-1374, decided March 21, 1984, and to correct certain factual errors set forth in respondents' briefs. Most importantly,

this Court in Stenson held in clear and unequivocal terms that attorneys' fees in civil rights cases are to be calculated based upon "prevailing market rates." The Court also reaffirmed the strong policy which favors negotiation and settlement by the parties of counsel fees obtained under the Civil Rights Attorneys' Fee Awards Act of 1976. This petition should be granted as the decision below approves a cutback of a negotiated fee to rates far below prevailing market rates and undermines the goal in Stenson of achieving a settlement of fee questions.

ARGUMENT

I.

The Ruling Below Violates the Requirement that Counsel Fees in Civil Rights Cases be Calculated on the Basis of Prevailing Market Rates

There is no disagreement in this record that the fees granted to petitioners' counsel, as reduced by the district court, resulted in an award far below prevailing market standards in the New York metropolitan area for attorneys of comparable experience engaging in comparable work. Indeed, the consent order states that $129.00 an hour rate agreed upon represents a "reasonable and appropriate amount for fees and costs to be taxed against the State defendants."

Respondents, however, argue that the writ should not be granted because they claim petitioners are interjecting a prevailing rate issue for the first time in this Court. This is simply untrue. In the district court petition-

ers challenged the fee reduction on the ground that counsel were entitled to prevailing market rates. At the district court level, petitioners submitted affidavits setting forth prevailing rates in New York City for comparable work handled by counsel of comparable experience. Such rates, which were not challenged, were from $175 to $225 per hour. Joint Appendix, filed in Court of Appeals, 114a-116a. The issue as to counsel's entitlement to prevailing market rates was also fully briefed in the Court of Appeals. Appellants' Brief on Appeal, pp. 26-33.

Under Stenson it is now clear that it is inappropriate to award counsel fees in civil rights cases at less than prevailing market rates. Indeed, this Court reaffirmed that Congress, in enacting the Fees Awards Act, "directed that attorney's fees be calculated

according to standards currently in use in other fee shifting statutes . . ." Slip op. at 6.

The district court, in its first ruling, justified reducing the fees below market rates on the basis that the work involved was not as difficult as work done in other cases and the result achieved was not as substantial as in another civil rights case the court had decided. Petition, 42a. After petitioners had challenged the fee reduction, the district court in its second ruling added that many of the hours in counsel's work entailed settlement negotiations, that there was a comparatively small risk to plaintiffs' counsel involved in bringing the action and that the settlement represented a compromise and not a win for plaintiffs. Petition 55a-56a. Petitioner Warbasse, in its

reply brief, also argues that petitioners' counsel did not keep contemporaneous time records.

None of these explanations warrant deviation from the Stenson standard. Clearly, in the New York metropolitan area attorneys do not lower rates to undertake settlement negotiations. Whether or not settlement negotiations are more or less taxing than drafting a complaint is irrelevant. In any event, petitioners submit that settlement negotiations constitute one of the more important and difficult attorney functions. The nature of the work performed simply does not justify the drastic fee reduction in this case.

It is difficult to understand how the district court concluded there was small risk to petitioners' counsel in filing this matter. This litigation raised unprecedented legal issues. The challenge to Warbasse maintaining a

special waiting list for children of cooperators presented a novel theory under the Fair Housing Act. Petitioners' claim emanated from an effect-impact argument under the Act, a virtually uncharted area of law. Petitioners had no evidence of intentional discriminatory acts on the part of Warbasse or the State respondents. Indeed, the challenged practices had all been sanctioned by the State respondents. This was high risk litigation.

It is a gross misrepresentation of the record for respondents to argue that there was relatively little success obtained by the petitioners. This argument simply fails to recognize what was accomplished through this litigation. The district court itself acknowledged that counsel had secured "significant relief" for the class represented. Petition, 31a.

As a practical matter, the petitioners charged that the practice at Warbasse of maintaining children's lists was illegal. The settlement ended that practice. Petitioners claimed they were deprived of housing because of the defendants' policies. The settlement obtained almost ten percent of the units in a very large housing project for the class members on a preferential basis. Thereafter, minorities will secure units through affirmative marketing procedures now required of Warbasse. These procedures will insure minorities equal access to units at Warbasse.

Respondent Warbasse also argues that below market rates were appropriate as petitioners' counsel failed to present adquate time records. In fact, petitioners' counsel discussed at length with the Magistrate the number of hours expended on this case, advised that contemporaneous records had been main-

tained, agreed upon a fee and incorporated that fee into the stipulation of settlement. The stipulation was presented to the district court with all counsel requesting approval.

On April 15, 1982, the parties appeared before the district court, at which time the Court requested counsel to file an affidavit to support the negotiated attorneys' fees. At that time, the court specifically stated that a detailed breakdown of the hours counsel had spent on this case was not required. Joint Appendix, 76a. In reducing the fees pursuant to its ruling of November 15, 1982, the district court did not question the number of attorney hours spent on this case. The court merely reduced the hourly rate.

At a later date, respondent Warbasse, in support of the court's action in reducing the hourly rate, argued that inadequate records had been presented.

Counsel for the petitioners then wrote the district court stating, "if the Court does believe that further documentation of hours is necessary over what has already been presented to the court, counsel is prepared to give a detailed breakdown of hours." Joint Appendix, 118a-119a. Further documentation was not requested by the court. The Second Circuit, in fact, specifically noted that neither its decision, nor the district court ruling, was based upon inadequate time records. Petition, 17a-18a.

On the record before this Court, the below market rates granted in this matter cannot be reconciled with the Stenson holding.

II.

The Decision of the Court Below Is Inconsistent with the Goal in Stenson to Achieve Negotiated Settlements of Attorneys Fees in Civil Rights Cases

In the petition filed with this Court, it is argued that the lower court's ruling is fundamentally inconsistent with this Court's ruling in Hensley v. Eckerhart, ___ U.S. ___ 76 L.Ed.2d 40 (1983), in that voluntary resolution of attorney fees issues are to be encouraged. This principal was reaffirmed in Stenson. In fact, this Court went further to state that a district court "has a responsibility to encourage agreement." Stenson, supra, slip op. at 14, n. 19. In so ruling, this Court noted that the district court has the intimate knowledge of the litigation which places it in a position to encourage the parties to settle fee questions.

In the instant case, the fees were negotiated in the presence of a Magistrate, the same court official who had shepherded the negotiations between the parties to a successful out of court resolution. See Magistrate's Report, Petition, 62a. There was no basis whatsoever for the district court to override the Magistrate's recommendation, which was supported at the time by all the parties, and substitute its judgment to cut back substantially on the agreed upon fees.

For the reasons set forth in the Petition, the decision below cannot be reconciled with the holdings in Hensley and Stenson, confirming the importance of negotiation and settlement of counsel fee questions.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, a writ of certiorari should be granted and the decision below reversed in light of Stenson.

Respectfully submitted,

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE AMERICAN CIVIL LIBERTIES UNION

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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The NAACP Legal Defense and Educational Fund, Inc. ("LDF") and the American Civil Liberties Union ("ACLU"), respectfully move the Court for leave to file the attached brief amici curiae in support of the petition for writ of certiorari in the above case. Although counsel for the petitioner and the respondent New York

State Division of Housing and Community Renewal have given their consent, respondent Amalgamated Warbasse Houses, Inc., has refused, thus necessitating this motion.

Amici are two non-profit, civil rights organizations which provide legal representation to persons seeking to vindicate civil and constitutional rights. Amici litigate throughout the federal courts and frequently appear as counsel before this Court representing Blacks, Hispanics and other minorities in cases arising under our federal civil rights laws and Constitution. Amici provide this representation through their own staff attorneys and through cooperating private counsel, whose substantial litigation costs and expenses are often paid by amici.

Attorneys' fees awarded to prevailing plaintiffs pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42

U.S.C. § 1988, directly affect both the quality and availability of representation for those parties traditionally served by amici. Since attorneys' fees are often the subject of arms' length negotiation between the parties, the standard of review to which a settlement is subjected by a trial court is of great concern to amici. If a trial court is able to substitute its judgment for that of the parties, where there is no evidence of collusion, adverse impact on the class, or windfall to plaintiff's counsel, and where the negotiated fee is reasonable, then it will become substantially more difficult for amici to provide much needed representation for clients otherwise unable to secure counsel.

Because we believe that the lower court decisions in this case will encourage parties to litigate the issue of attorneys' fees and make it more difficult for

poor persons to obtain counsel, we believe the views expressed in the attached Brief Amici Curiae will be of assistance to the Court in deciding whether to grant the petition.

Respectfully submitted,

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AMALGAMATED WARBASSE HOUSES, INC., et al.,

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BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE AMERICAN CIVIL LIBERTIES UNION AS AMICI CURIAE

Summary of Argument

I.

The result reached by the courts below will necessarily result in a prolifieration of extended litigation over the amount of attorneys' fees. By discouraging settlement of fees questions and by introducing

uncertainty in the process, lawyers will be discouraged from taking civil rights cases, contrary to Congressional purpose.

II.

When a fee settlement is non-collusive, does not adversely affect class members, and provides for hourly rates in the range prevailing in the community, a district court should not substitute its judgment for that of the parties as to the reasonableness of the amount.

III.

The decisions below, by approving lower rates for civil rights cases, applied incorrect legal standards. They are contrary to Congressional intent and undermine the national policy of vigorous enforcement of the civil rights laws.

ARGUMENT

I.

The Lower Court Decisions WIll Encourage Litigation of Attorneys' Fees Issues And Will Make It Difficult for Disadvantaged Persons to Obtain Counsel.

A. The Lower Court Decisions Encourage Litigation.

In Hensley v. Eckerhart, ___ U.S. ___, 76 L.Ed. 2d 40 (1983) this Court stated that "[a] request for attorney's fees under 42 U.S.C. § 1988 should not result in a second major litigation," and that "ideally . . . litigants will settle the amount of a fee." Id. at 53. This view has also been advanced by lower courts. See, e.g., National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1330 (D.C. Cir. 1982). But the lower court decisions in the case at bar would actually encourage plaintiffs to litigate the amount of attorneys' fees.

The parties in this case conducted arms' length negotiations after they had reached agreement on all substantive matters and arrived at what they believed to be a fair and reasonable fee award. The district court then reduced this fee to what it considered to be a more reasonable sum, while acknowledging that there was no evidence of collusion, adverse impact on the class, or a windfall to plaintiffs' counsel.

If a district court may substitute its judgment for that of the parties in this manner, all incentives for plaintiffs to settle in these cases would be removed. A settlement would merely become a maximum figure under which a district court would then be free to fix the actual award. In the vast majority of cases, of course, the settlement figure is already a compromise amount that is less than what would be

sought by plaintiffs if the issue were litigated. It has been amici's experience that plaintiffs' counsel are willing to accept lower hourly rates, reduced hours, and/or the abandonment of any upward adjustment for contingency, etc., in exchange for speed and certainty of payment. The result of the lower court's decision is to remove these incentives to settlement.

It would, therefore, make more economic sense for plaintiffs to litigate the fee issue in most if not all cases. By seeking the full amount to which they believed themselves entitled, plaintiffs would almost certainly increase the maximum figure used by the district court by a detailed presentation using time records and extensive documentation. Such a result is not in accord with this Court's statements in Hensley, and is not sound policy.

B. The Lower Court Decisions Will Discourage Acceptance of Civil Rights Cases.

The district court in this case disregarded the negotiated fee and reduced the award to a sum it felt was more reasonable. Its actions, if upheld, will certainly discourage many private practitioners from accepting civil rights cases. Potential counsel would realize that, even assuming they could obtain a satisfactory result for their clients, any settlement of a fee amount no matter how reasonable could easily result in an inadequate award from the district court. Moreover, if they should decide to forego the settlement process entirely and litigate the issue, they would have to commit substantially more time and resources to the trial and subsequent appeals and they would still not be sure of a satisfactory result. Accepting a civil rights case would therefore

become a highly speculative venture for anyone without substantial independent resources.

As was argued by respondent and amici in Blum v. Stenson, No. 81-1374, the express purpose of Congress in enacting the 1976 Act was to encourage the private enforcement of civil rights cases. See, e.g., S. Rep. No. 1011, 94th Cong., 2d Sess. (1976) reprinted in 1976 U.S. Code Cong. & Ad. News 5908-14; H.R. Rep. No. 1558, 94th Cong. 2d Sess. (1976), reprinted in E. Larson, Federal Court Awards of Attorney's Fees, 288-312 (1981). This legislative purpose is seriously undermined by the decisions of the lower courts in this case. If considered in light of this Court's pronouncement that settlement of attorneys' fees should be encouraged, the legislative policy is best advanced by a rule which would require a district court

to assume the reasonableness of a negotiated fee settlement where there is no evidence of collusion, adverse impact or windfall to plaintiffs' counsel. Because neither the district nor the circuit courts adopted this analysis, this Court should grant Appellant's Petition of Certiorari and reverse the lower court decisions.

II.

The District Court Abused Its Discretion by Setting Aside A Negotiated Fee Settlement in Favor of A Sum More Advantageous to Respondents.

Under Federal Rule of Civil Procedure 23(e) all settlements of class actions require the approval of the district court. The courts and commentators generally agree that the purpose of this rule "is to protect the nonparty members of the class from unjust or unfair settlements affecting their rights." Piambino v. Bailey, 610 F.2d 1306, 1327 (5th Cir.

1980). See also 7A C. Wright & A. Miller, Federal Practice & Procedure § 1797, at 226 (1972). In addition, 42 U.S.C. § 1988 authorizes the court to award "reasonable" attorney fees. By implication then, F.R.C.P. 23(e) and the 1976 Act require the court to make some inquiry as to the reasonableness of a proposed settlement of attorneys' fees. But in the present case the district court abused its discretion by setting aside just such a reasonable fee.

A trial court undeniably has discretion to determine the amount of attorneys' fees to be awarded in a particular case.[1/] But this discretion is not unlimited. A district court may not, for example, arbi-

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1/ Hensley v. Eckerhart, supra at 53; Thornberry v. Delta Airlines, Inc., 676 F.2d 1240 (9th Cir. 1982); Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982).

trarily reduce hours or rates without explanation.[2/] And it has been held that a district court may not merely recite the factors of Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th cir. 1974) and announce a result.[3/] Most importantly, it has been held that despite its obligation to protect nonparty class members and the integrity of Rule 23(e) in all settlements, district courts should not "substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel," in any class action. Armstrong v. Bd. of School

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2/ Northcross v. Board of Education, 611 F.2d 624, 637 (6th Cir. 1979); Marable v. Walker, 704 F.2d 1219, 1222 (11th Cir. 1983).

3/ See, e.g., Northcross v. Board of Education, supra at 642; Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575, 583 (5th Cir. 1980); Graves v. Barnes, 700 F.2d 220, 221 (5th Cir. 1983).

Directors of the City of Milwaukee, 616 F.2d 305, 315 (7th Cir. 1980), reh. and reh. en banc denied, id. But this is exactly what the district court did in the case at bar.

The $129 per hour figure agreed to by the parties was neither excessive nor abnormal.[4/] The district court noted that

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4/ A recent report demonstrates that the negotiated fee was well within the range of hourly rates billed by New York firms. According to the National Law Journal, Feb. 27, 1984, p. 31, hourly rates billed by partners in major New York firms ranged from a low of $142 per hour to a high of $260 per hour, with an average rate of $183. The respective rates for associates were $71, $135, and $98 average. The same study shows that the average hourly rate in 1982 for lawyers with 11-20 years of experience in cities with more than one million in population in the Northeastern United States was $123. Id. at 32. Finally, the average hourly rate for partners specializing in antitrust cases was $159, with a low of $118 and a high of $238. The average rates for associates in antitrust firms was $85, with a low of $75 and a high of $104. (Id. at 34). Therefore, the hourly rate awarded by the district

it had approved a substantially similar fee in a recent case. Petition of writ of certiorari, pp. 40a-41a.[5] And equivalent fees have been granted in other settlements of civil rights cases. See, e.g., Bradford v. Blum, 507 F. Supp. 526 (S.D.N.Y. 1981). Moreover, as the Second Circuit noted, a federal magistrate assisted in these negotiations and the State Attorney General joined in the negotiations and agreement in this case. The settlement negotiations took place after all substantive issues had

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4/ continued

court was below the average market rates for associates generally, and at the lowest rate for associates specialing in antitrust cases, which Congress cited as the standard for measuring the reasonableness of fees in civil rights cases. S. Rep. No. 94 1011, p. 6, 94th Cong., 2d Sess. 1976.

5/ It should be noted that this latter fee was approved in a case where there was no agreement between the parties. See Selzer v. Fleisher, 629 F.2d 809, 814 (2d Cir. 1980).

been agreed to by the parties, so the eventual fee and even its reduction by the district court had no impact on the class. Under these circumstances, the settlement reached by the parties was clearly reasonable and equitable. The district court abused its discretion by setting aside this negotiated fee where there was no evidence of collusion, adverse impact to the class or windfall to plaintiffs' counsel. The court merely substituted its judgment for that of the parties while doing little to protect the integrity of Rule 23(e) or the legislative policy of the 1976 Act.

III.

The Lower Courts Did Not Apply The Correct Standards.

The district court began its analysis of the negotiated fee in this case by noting that it felt "constrained to scrutinise the attorneys' request with more

care" since both defendants were "dealing with taxpayers funds." (Pet. for Certiorari, p. 38a). The court implied that had the defendants in this case not been public entities, the "reasonableness" of the negotiated fee would have been assumed. The Court essentially applied a stricter standard of review to public litigants than it would have to private litigants, a position which has been rejected routinely by lower courts. See, e.g., Custom v. Quern, 482 F. Supp. 1000 (N.D. Ill. 1980); Gary B v. Cronin, 542 F. Supp. 102 (N.D. Ill. 1980). Since the purpose of the 1976 Act, was to increase the number of attorneys willing to accept constitutional and civil rights cases, Congress could not have intended that public defendants be shielded from higher attorneys if those

fees could be justified.[6/] The district court therefore erred by forcing the parties in this case to meet a higher standard of review.[7/]

6/ A number of the cases cited with approval in the Senate Report on 42 U.S.C. § 1988 involve public defendants. See, S. Rep. No. 94-1011 supra at 6 (1976).

7/ The District Court also justified its reduction of Appellant's fee because this case was settled and plaintiffs therefore "did not win." Pet. for Writ of Certiorari, p. 56a. It is well established that settlement does not weaken a prevailing plaintiffs' claims to attorneys' fees. Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980); Greenside v. Ariyoshi, 526 F. Supp. 1194, 1196 (D.C. HI, 1981). See also Doe v. Busbee, 684 F.2d 1375 (11th Cir. 1982). As the Second Circuit noted, the settlement in the present case "provided significant relief to the class . . . ." Pet. for writ of certiorari, pp. 4a-5a. Under these circumstances, appellants should not be penalized for achieving a substantial result even though it came through the settlement process and not a full trial.

Finally, the court of appeals clearly based its decision on the notion that fee awards in civil rights cases should be "moderate" (Pet. for Writ of Cert., p. 12a); i.e., less than those routinely given in other types of litigation. Such a result, however, is squarely inconsistent with Congressional intent, which was to ensure that attorneys would be drawn to civil rights litigation by the availability of fees equivalent to those awarded in litigation such as anti-trust.

As we have demonstrated above (see n. 4, supra) the hourly rates awarded here are far below those available to similarly experienced attorneys in anti-trust and other specialties. The sure result will be to discourage the bar from taking on this type of complex litigation, and the subsequent undermining of the enforcement of the civil rights laws.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted and the judgment of the court below reversed.

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